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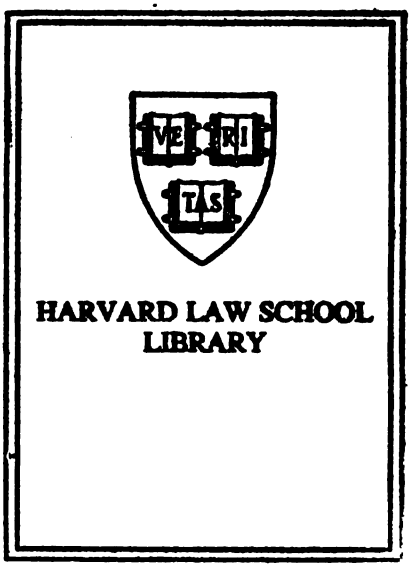

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52:10 LRA 544n
12 LRA 433n
27 LRA 503n

101:28 LRA 795

116:35 LRA 98

131:30 LRA307n
30 LRA 316n
30 LRA 320n

150:34 LRA452n

153:54 Fed 869
73 Fed 596
76 Fed 94
29 LRA 333

173:10 LRA250n
10 LRA 477n
19 LRA 454n
32 LRA 700n

181:22 LRA 643

189:76 Fed 93

193:18 LRA 338

195:11 LRA632n
11 LRA 705n
30 LRA 728

211:52 Fed 798
14 LRA 59n
21 LRA 551n

231:13 LRA298n
24 LRA 800n

241:12 LRA470n
34 LRA 33n

279:18 LRA 338

281:29 LRA 323

285:15 LRA 67
38 LRA 357
38 LRA 509n

328:20 LRA207n
21 LRA 54n

347:23 LRA 479

386:161 Mas 14
33 LRA 593n

419:14 LRA264n

432:21 LRA 77n
22 LRA 41

442:19 LRA590n
36 LRA 164

450:166 Mas 60
33 LRA 307n
36 LRA 165

467:18 LRA278n
19 LRA 81n
20 LRA 158
29 LRA 384n
36 LRA 847n

478:13 LRA704n
20 LRA 563n

496:38 LRA 502

513:18 LRA307n

528:26 LRA 602

543:26 LRA598n

549:32 LRA 60n

564:24 LRA658n

583:20 LRA533n
21 LRA 493n
32 LRA 107

592:33 LRA184n

639:34 LRA193n

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 31, TO DECEMBER 24, 1890.

WILLIAM D. FULLER,

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VOL. 83.

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For 1891.

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[TERM EXPIRES DECEMBER 31, 1891.]

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CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

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GEORGE S. SWIFT. . . . . F. H. CHAMBERS.

(Jan. 7, Mar. 4, May 6, July 1, Sep. 2, Nov. 4, 1891.)

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

(Mar. 9, May 11, 1891.)

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TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	February 10.	June 23.	November 17.	
Alger	11	June 2.	Nov. 10.		
Allegan	20	February 9.	May 18.	October 5.	December 7.
Alpena	26	February 10.	May 5.	August 11.	November 3.
Antrim	13	March 10.	May 19.	July 28.	November 10.
Arenac	18	February 23.	Aug. 24.		
Baraga	12	January 5.	June 8.	October 5.	
Barry	5	February 9.	May 11.	August 17.	November 9.
Bay	18	March 3.	June 2.	September 1.	December 1.
Benzie	23	April 14.	Sept. 1.	December 1.	
Berrien	2	January 13.	March 17.	May 19.	October 20.
Branch	15	March 3.	June 1.	October 5.	December 7.
Calhoun	5	March 9.	June 1.	September 14.	December 7.
Cass	2	February 17.	April 28.	September 22.	December 1.
Charlevoix	13	February 17.	May 12.	July 21.	November 17.
Cheboygan	13	January 27.	March 24.	June 16.	September 22.
Chippewa	11	February 3.	May 12.	September 15.	
Clare	21	January 5.	March 30	June 22.	September 21.
Clinton	29	February 2.	April 27.	June 29.	November 9.
Crawford	23	January 13.	April 21.	October 6.	
Delta	25	January 6.	May 5.	September 29.	
Eaton	5	January 19.	April 20.	July 20.	October 19.
Emmet	13	February 10.	May 5.	July 14.	October 27.
Genesee	7	February 23.	May 25.	August 17.	November 16.
Gladwin	18	January 19.	May 25.	October 12.	
Gogebic	12	January 29.	May 11.	August 3.	November 2.
G'd Traverse	13	January 6.	April 7.	June 23.	October 13.
Gratiot	29	March 9.	June 1.	September 14.	December 7.
Hillsdale	1	January 13.	March 17.	September 1.	November 10.
Houghton	12	February 9.	May 25.	August 17.	November 16.
Huron	24	January 5.	March 2.	June 1.	October 26.
Ingham	30	January 5.	March 9.	May 25.	October 19.
Ionia	8	February 2.	May 4.	September 21.	November 2.
Iosco	23	March 3.	June 2.	September 1.	December 1.
Iron	25	January 14.	May 13.	October 7.	
Isabella	21	February 23.	May 18.	September 7.	October 19.

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TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	February 2.	April 20.	September 14.	November 16.
Kalamazoo	9	February 16.	May 18.	October 12.	December 14.
Kalkaska	28	January 13.	April 21.	September 8.	
Kent	17	March 2.	May 4.	September 28.	December 7.
Keweenaw	12	January 12.	June 15.	October 12.	
Lake	19	February 16.	June 15.	October 12.	
Lapeer	6	January 12.	March 9.	July 13.	November 2.
Leelanaw	13	March 17.	June 9.	November 24.	
Lenawee	1	February 10.	April 28.	October 6.	December 8.
Livingston	30	January 12.	April 20.	June 15.	October 12.
Luce	11	May 5.	Nov. 3.		
Mackinac	11	February 24.	June 9.	October 13.	
Macomb	16	January 19.	April 20.	August 17.	October 19.
Manistee	19	January 19.	May 4.	August 10.	October 26.
Manitou	11	June 23.	Oct. 27.		
Marquette	25	February 9.	May 20.	September 8.	December 1.
Mason	19	February 2.	May 18.	August 24.	November 9.
Mecosta	27	January 6.	April 7.	July 2.	November 3.
Menominee	25	January 20.	April 21.	August 25.	November 10.
Midland	21	January 19.	April 13.	August 31.	September 28.
Missaukee	28	March 3.	July 21.	December 8.	
Monroe	22	February 3.	April 7.	September 8.	November 3.
Montcalm	8	March 2.	June 1.	October 5.	December 7.
Montmorency	26	May 19.	Sept. 15.		
Muskegon	14	February 9.	May 11.	September 14.	November 23.
Newaygo	27	March 3.	June 2.	October 6.	December 1.
Oakland	6	February 2.	May 4.	September 21.	December 7.
Oceana	14	January 12.	April 20.	August 17.	October 26.
Ogemaw	23	January 27.	May 12.	October 20.	
Ontonagon	12	January 19.	June 22.	October 19.	
Osceola	19	March 2.	June 1.	September 14.	December 7.
Oscoda	23	February 23.	May 25.	November 2.	
Otsego	26	January 20.	June 16.	October 6.	
Ottawa	20	January 12.	March 9.	August 3.	November 2.
Presque Isle	26	January 13.	June 9.	October 13.	
Roscommon	28	February 3.	May 26.	October 13.	
Saginaw	10	February 2.	April 13.	June 8.	Oct. 5. | Dec. 7.
Sanilac	24	January 19.	April 13.	June 2.	September 28.
Schoolcraft	11	January 20.	April 28.	September 8.	
Shiawassee	7	February 2.	May 4.	September 14.	December 14.
St. Clair	16	February 16.	May 18.	September 21.	November 16.
St. Joseph	15	January 20.	March 24.	July 14.	October 27.
Tuscola	24	February 2.	May 4.	September 7.	December 7.
Van Buren	9	January 12.	April 13.	September 14.	November 9.
Washtenaw	22	March 2.	May 4.	October 5.	December 7.
Wayne	3	January 6.	April 7.	June 16.	September 8.
Wexford	28	January 20.	April 28.	July 28.	November 3.

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TABLE OF CASES REPORTED

IN VOLUME 83,

WITH DIGEST OF POINTS DECIDED.

A.

PAGE

ABBOTT v. CHAFFEE 256

Assignment for benefit of creditors—Failure of assignee to file statutory bond will not entitle a mortgagee, under a mortgage fraudulent as to creditors, to recover from the assignee the value of his lien—Filing and approval of bond after statutory ten days will not vest title in assignee.

ABRAHAM v. STEWART 7

Land contract—Condition for the erection by the vendee of a dwelling-house of a specified character and description is performed by moving a house, of the agreed character and dimensions, onto the land—Vendor may insist upon the insertion in his deed of a like condition, where the contract provides that the deed shall be subject thereto, and upon its performance so long as it is of any benefit to him or his grantee.

ALLIS v. VOIGT 537

Pleading—Recovery for extra fly-wheel furnished in place of one broken, as claimed, by the negligence of the vendee of a power outfit for a flouring mill, cannot be had under the common counts in *assumpsit*, the bill of

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PAGE

Allis v. Voigt—Continued.
particulars covering all of the machinery, including the original fly-wheel.

APPEAL OF WILLIAM BLACK 518

APSEY v. DETROIT, LANSING & NORTHERN RAILROAD COMPANY 432
Negligence—Plaintiff held guilty of negligence in approaching and crossing railroad track.

APSEY v. DETROIT, LANSING & NORTHERN RAILROAD COMPANY 440
Contributory negligence—Becomes a question of law where the testimony, which is neither conflicting nor contradictory, shows that the party injured was guilty of negligence.

ARNOLD, DIKEMAN v. 218

ARNOLD v. WHITCOMB 19
Deed—Mental competency of grantor—No legal question involved.

ATKINSON v. WEIDNER 412
Discontinuance—As to a married woman, who is a payor in a joint promissory note, will not prevent judgment against remaining defendants.

AUDITOR GENERAL v. MCLAULIN 352
Taxes—Advertising fee of one dollar cannot be added to taxes until after the publication of the tax petition.

AUDITOR GENERAL v. O'CONNOR 464
Tax law of 1889—Proviso of section 95, authorizing the receipt of 50 per cent. of taxes of 1885, and previous years, as full payment, applies where such taxes have been reassessed.

AUDITOR GENERAL v. REGENTS OF THE UNIVERSITY OF MICHIGAN 467
Taxes—Property held by the Regents of the State University in trust for the corporation is exempt from taxation.

AUDITOR GENERAL v. REYNOLDS 471

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PAGE

AUDITOR GENERAL v. ROBERTS 471

Constitutional law—Provision of tax law of 1889, authorizing the sale of lands delinquent for taxes of prior years, is constitutional—Taxes—Record of equalization which fails to show assessed valuation of several townships, and the amounts added to or deducted therefrom, if any, is fatally defective.

AUDITOR GENERAL v. STILES 460

Taxes—Tax law of 1889 construed—Personal decree cannot be entered against the land-owner—Owner at time petition is filed is a proper party—If his grantor conveyed with covenants of warranty, he may notify him to appear and defend—Allegations in answer to tax petition that land was assessed beyond its cash value, and that such excessive assessment was fraudulent and void, is too general to permit evidence of fraud—Excessive valuation is not sufficient evidence of fraud on the part of assessor or board of review—Warrant addressed to the treasurer of the township of ———, not fatally defective if signed by the supervisor of a specified township, and annexed to its tax roll.

B.

BAILEY, HANAW v. 24

BALDWIN v. CITY OF HASTINGS 639

Taxes—Exemption in a city charter of unplatted parcels of farming land, containing not less than ten acres, from taxation for fire-department purposes, is a valid and reasonable one—Levy of taxes upon such exempted land to pay interest on bonds issued to raise money for construction of water-works under general statute—Judgment in favor of the city in a suit by the land-owner to recover such taxes, which he had paid under protest, affirmed—Rule that where a portion of a tax is illegal, and a tax-payer has no way of separating it from the legal portion, he is not bound to pay any of the tax, held inapplicable in such a case.

BALL, BELKNAP v. 583

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PAGE

BARBER v. SAGINAW UNION STREET RAILWAY 299

Decree held to have afforded complainant all of the relief she is entitled to, and it is affirmed.

BATEMAN v. BLAISDELL 357

Findings of fact—Draft of may be prepared by the attorney for the prevailing party—Appellate court cannot draw any inferences from the testimony contrary to the facts found—Finding by circuit judge that the giving of the two chattel mortgages involved in this case *was* virtually one transaction, and that the payments made with sum tendered were sufficient to discharge the lien, is affirmed.

BATES v. SMITH 347

Sale—Existence of subject-matter essential to validity of every executed contract of sale—Notice to purchaser of mare that she had been bred to a certain stallion is not sufficient to put him on inquiry as to rights of owner of stallion growing out of such fact.

BELKNAP v. BALL 583

Libel and slander—Declaration held to state a cause of action—Criticism—As applicable in libel cases, is a censure of the conduct, character, or utterances of the person criticised—Candidate for office places his conduct, character, and utterances before the public for their discussion and consideration—Such criticism is permissible if the writer or speaker in their statements of, or reference to, the facts upon which the criticism is based, observes an honest regard for the truth—Publications of falsehoods are never privileged.

BENEDICT v. TORRENT 181

Tenants in common—Sale by one tenant of his interest in timber on lands held in common—Grantee takes the interest in the timber upon such portion of the land as shall be set off to his grantor on a partition of the entirety of the estate.

BENNETT, PEOPLE v. 457

BEVIER v. O'CONNER 310

See *Wolf v. O'Conner.*

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PAGE

BITZER v. WAGAR 223

Bills and notes—Note payable to "the order of Marget A. Bitzer (or bearer)" is payable to bearer—Suit may be maintained thereon in name of any holder.

BJORKQUEST v. WAGAR 226

Parties—Sole proprietor of a business, carried on under a firm name, must sue in his individual name.

BLACK'S APPEAL 513

BLAISDELL, BATEMAN v. 357

BLISS, SPAULDING v. 311

BOARD OF CITY CANVASSERS OF DETROIT, COLL v. 867

BOURGET v. DONALDSON 478

Mechanic's lien—Assignment by contractor of moneys to become due upon the contract, with notice to the land-owner, will not cut off lien of subcontractor—Such lien will be limited to amount due when notice thereof is filed and served—Costs—If land-owner is compelled to appear and answer a bill filed by such subcontractor, and discloses amount unpaid on the contract, with proffer of payment to the person adjudged entitled thereto, he is entitled to his costs.

BREWER v. GEROW 250

Highways—Town-line road must be laid out by joint action of commissioners.

BROWN v. CITY OF GRAND RAPIDS 101

Taxes—Review of assessment proceedings—If land-owner fails to appear before the body appointed with power to set assessment aside or correct the error complained of, after due notice, he is not in a situation to appeal to the courts for redress in the absence of fraud or bad faith.

BROWN, WIDIMAN v. 241

BUCK, LONGYEAR v. 236

BURNETT, COOK v. 251

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PAGE

C.

CALDWELL v. WARD..... 13

Constitutional law—Title to a bill authorizing the township treasurers of a designated county to *force* the collection of taxes, and of a substitute authorizing the issuance of injunctions to restrain waste upon lands delinquent for taxes, relate to the same subject-matter—In the absence of the original bill, its provisions will be presumed to have been germain to the object expressed in the title—Right to enlarge territory within which act shall be operative in such substitute is unquestioned, and this can be done after the fifty-day limit for introduction of bills—Taxes—Bill filed under Act No. 223, Laws of 1889, need not allege that the land would be worthless without the timber, or not worth amount of tax—Statute only applies to *wild* lands—Bill cannot be filed while tax roll is in the treasurer's hands, nor until time for payment of taxes has expired.

CAMPAU, TOLEDO, SAGINAW & MACKINAW RAILROAD COMPANY v.....31, 33

CHAFFEE, ABBOTT v..... 256

CHICAGO & GRAND TRUNK RAILWAY COMPANY, HAMMOND v... 334

CHICAGO & GRAND TRUNK RAILWAY COMPANY, WELLMAN v.. 592

CIRCUIT JUDGE OF KALAMAZOO COUNTY, PALMER v..... 528

CIRCUIT JUDGE OF WAYNE COUNTY, WERTHEIMER v..... 56

CIRCUIT JUDGE OF WAYNE COUNTY, WILLCOX v..... 1

CIRCUIT JUDGE, PORTSMOUTH SAVINGS BANK v..... 646

CITY BOARD OF CANVASSERS, COLL v..... 367

CITY OF GRAND RAPIDS, BROWN v..... 101

CITY OF HASTINGS, BALDWIN v..... 639

CITY OF MUSKEGON, RIFENBURG v..... 279

CLARK, EDWARDS v..... 246

COLL v. CITY BOARD OF CANVASSERS OF DETROIT..... 367

Election—The duty of the city board of canvassers of Detroit to foot up the returns of the boards of inspec-

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PAGE

Coll v. City Board of Canvassers of Detroit—Continued.
tors, and declare the result, and issue certificates accordingly, is purely clerical—Performance of such duty will be enforced by *mandamus*.

COLLIER, PEASLEE v. 549

COMMISSIONER OF HIGHWAYS OF THE TOWNSHIP OF HARTFORD, COX v. 193

CONTINENTAL INSURANCE COMPANY OF NEW YORK, RICHARDS v. 508

COOK v. BURNETT 251

Practice in Supreme Court—Exception to conclusion of law is indispensable to its review—Judgment affirmed, it not being assigned as error that the facts found do not support the judgment.

CORTLAND MANUFACTURING COMPANY v. PLATT 419

Fraudulent purchase—Effort by vendor to compromise or obtain payment will not bar rights of rescission—Evidence—Opposite counsel have the right to inspect *memoranda*, upon which a witness relies in testifying, for purposes of cross-examination—Commercial agencies—Duty of merchants as to reporting financial condition, stated.

COX v. COMMISSIONER OF HIGHWAYS OF THE TOWNSHIP OF HARTFORD 193

Highways—Proceedings to discontinue, and lay out a new one, cannot be joined—Ten full days' notice of hearing of petition must be given—Return must show that commissioner determined the necessity for the action taken.

CUMMINS, KEENAN v. 48

D.

DAMON v. DEBAR 262

Consideration—Promise by payee, made after maturity of note, to receive in payment 200 posts for $10, and apply the same on note, is of no validity until delivery and acceptance of posts.

DAVENPORT, MCKISSON v. 211

Digitized by Google

PAGE

DEBAR, DAMON v. 262

DEER LAKE COMPANY v. MICHIGAN LAND & IRON COMPANY 11

Bill to quiet title—Remedy at law held adequate.

DENISON, GUNN HARDWARE COMPANY v. 40

DETROIT CITY CANVASSERS, COLL v. 367

DETROIT, LANSING & NORTHERN RAILROAD COMPANY, APSEY v. 432, 440

DIKEMAN v. ARNOLD 218

Res judicata—Law of case settled in 71 Mich. 656, and 78 Id. 455—Argument to jury—Counsel entitled to some license in making—Record and brief—If printed and served together, inclosing the clauses of the charge which are objected to in brackets in the record is a convenient method of calling attention to them, and is permissible.

DIX, MCNUTT v. 328

DONAHOE, FINN v. 165

DONALDSON, BOURGET v. 478

DOWLING v. SALLIOTTE 131

Deed—If grantors are in fact husband and wife, an estate in joint tenancy is created—Relationship may be shown by parol, if not stated in deed—How. Stat. §§ 5560, 5561, in so far as they provide for the creation of such an estate, are not repealed by the "married woman's act," so called—*Per curiam* opinion—Has same force, as a decision, as a more elaborate opinion.

DUNSTON v. HOPTONIC COMPANY 372

Parties—All of the stockholders of a corporation, who are not shown to be minors, insolvents, or non-residents of the State, are necessary parties to a judgment creditors' bill to which a portion of such stockholders are made parties.

DURFEE v. NEWKIRK 522

Exemplary damages—Never allowed where damages are capable of accurate pecuniary estimation.

DWIGHT, FIRST NATIONAL BANK OF MAUCH CHUNK v. 189

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PAGE

DWIGHT, SECOND NATIONAL BANK OF MAUCH CHUNK V..... 192

E.

EDSON V. HUDSON..... 450

Insolvency—May always be submitted to the jury, with other facts, to show an intention to defraud in the purchase of goods—While, standing alone, it is not a badge of fraud, yet, when coupled with the concealment of a large mortgage on the vendee's stock of goods, it tends to show a fraudulent purchase—Mortgage—To secure antecedent debt—Mortgagee not a purchaser for value.

EDWARDS V. CLARK..... 246

Evidence—Of parol agreement that an existing incumbrance covenanted against in a deed was to be regarded as in fact no incumbrance, is inadmissible—Deed with covenant against incumbrances passes to grantee right to collect rent from tenant—Such collection cannot be prevented by refusal of tenant to attorn to grantee—If grantee accepts tenancy, the amount of rent received should be deducted from the damages found in his favor in an action for breach of such covenant by reason of such tenancy.

ERICKSON V. MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY..... 281

Negligence—Declaration held to state a cause of action.

F.

FEDERAL BANK OF CANADA, GRAY V..... 365

FILER, WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK V..... 496

FINN V. DONAHOE..... 165

Chattel mortgage—Agreement to repay a loan, made to enable vendee to purchase a stock of goods, out of the first moneys realized from their sale, and before payment of the balance of the purchase price, is not equivalent to an agreement to secure the loan by a chattel

Digitized by Google

PAGE

Finn v. Donahoe—Continued.
mortgage on the goods—Rights of pledgee in possession are superior to the lien of a chattel mortgage given pending such possession by a vendee to secure a pre-existing indebtedness.

FIRST NATIONAL BANK OF MAUCH CHUNK v. DWIGHT..... 189
Judgment creditors' bill—Can only be filed after the return of an execution unsatisfied, which was delivered to the proper officer at least 20 days before, and which remained in his hands until, the return-day.

FIX v. SISSUNG..... 561
Replevin—Of flock of geese, appraised at $8.80, but alleged to be worth $200 in the declaration—Judgment of circuit court dismissing suit for want of jurisdiction, affirmed.

FLETCHER v. FORLER..... 52
Pleading—Declaration, in suit by wife to recover damages for sale of liquor to her husband when intoxicated, need not allege defendant's knowledge of his condition—Declaration in this case held to contain all of the elements of statutory liability.

FORD, HARVEY v..... 506

FORLER, FLETCHER v..... 52

FORT-STREET UNION DEPOT COMPANY v. JONES..... 415
Condemnation proceedings—Prior negotiations required by the statute contemplate knowledge on the part of the land-owner of the *purpose* for which the land is wanted—*Bona fide* offer of amount which a railroad company considers a fair price, and its refusal, constitute sufficient negotiations—Fact that agent who made the offer had no expectation that it would be accepted is of no consequence—Jury are judges of the law and facts—Are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, as much as the testimony of witnesses to matters of opinion—Appellate courts should not interfere, unless errors complained of are such as may be fairly said to have had a controlling influence in secur-

Digitized by Google

PAGE

Fort-street Union Depot Company v. Jones—Continued.
ing the result—Award should only be set aside when clearly against the evidence.

FORT-STREET UNION DEPOT COMPANY v. MORTON..... 265

Constitutional law—Union Depot Act of 1881 is constitutional—Oath to jury in condemnation proceedings under, that they would "justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause," is sufficient—No force in contention that act does not contemplate more than one union depot in each city or village.

FRITZ, LUTTENTON v..... 145

G.

GEORGE T. SMITH MIDDLINGS PURIFIER CO., IN RE..... 518

GEROW, BREWER v..... 250

GILCHRIST, THREE RIVERS NATIONAL BANK v..... 253

GRAND v. MICHIGAN CENTRAL RAILROAD COMPANY..... 564

Negligence—Brakeman held guilty of in attempting to uncouple cars while passing over a "split switch," which, as he must have known, could not be blocked at the place where his foot was caught—Whether the "railroad frog-bill," so called, applies to split switches, which were not in use when it was passed, query—Failure to comply with law, where applicable, will render railroad company liable to an employé who is thereby injured, in the absence of contributory negligence.

GRAND RAPIDS CITY, BROWN v..... 101

GREAT CAMP OF THE KNIGHTS OF THE MACCABEES, PEET v... 92

GRAY v. FEDERAL BANK OF CANADA..... 365

Mortgage foreclosure—Sale cannot be decreed until one year after amendment adding new party defendant.

GROTE, SCHUFFERT v..... 268

Digitized by Google

PAGE

GUNN HARDWARE COMPANY v. DENISON 40

Attachment suit—Defects in affidavit waived by pleading to the merits.

II.

HALL, MOGG v. 576

HAMMOND v. CHICAGO & GRAND TRUNK RAILWAY COMPANY 334

Negligence—Question of master's liability does not arise, if sole act of negligence of foreman is consented to by the injured workman, with full knowledge of the peril involved—Evidence of foreman's unfitness for his position, by reason of intemperate habits, is irrelevant, it not being claimed that he was under the influence of liquor on the day of the accident.

HANAW v. BAILEY 24

Forcible entry and detainer—Notice by tenant, after appealing from judgment of restitution, that he would quit the farm on a certain date, with request to the landlord to divide the common property, coupled with such removal, held not to satisfy the judgment, or to be an admission of an unlawful holding when suit was commenced—Affidavit in form used on appeal from justices' courts, sufficient—Acceptance of bond in a certain penalty, and a return by the commissioner, raise a presumption that he approved the bond, and fixed its penalty—Farm lease—Provision that farm should be worked in a good and workman-like manner, and in default that landlord might perform the work, and deduct the cost from tenant's share of crops—Such default held not to forfeit lease, the forfeiture and reentry clauses being stricken therefrom.

HARPER PEOPLE v. 278

HART, CIRCUIT JUDGE, PORTSMOUTH SAVINGS BANK v. 646

HARVEY v. FORD 506

Partnership—One partner may secure firm debts by chattel mortgage—How. Stat. § 7686, providing for exemptions, does not apply to such a mortgage, although the

Digitized by Google

PAGE

Harvey v. Ford—Continued.
other partners may be ignorant of its execution—Bill of sale by one partner of all of his interest in the firm assets, and the assumption by the vendee of the undivided debts, constitutes him a partner, if the other partner consents to the sale, and to the purchaser's taking the place of the vendor in the firm—Non-execution of articles of partnership, which are to be thereafter entered into, is no evidence of its non-existence.

HASTINGS CITY, BALDWIN v. 639

HATCH v. MCBRIEN 159
Statute of frauds—Purchase of goods—Agency—Contract construed.

HEINEMAN v. SCHLOSS 153
Garnishment—Act No. 244, Laws of 1889, enabling creditors to reach the value of property disposed of by a garnishee, and which he held under a conveyance void as to creditors, applies to garnishment proceedings commenced after the act took effect, although the property was disposed of prior to that date.

HILL, SHAW v. 322

HIRSHFIELD v. WALDRON 116
Married woman—Liable for price of clothing purchased for a minor son, and charged to her by her direction, and on her agreement to pay for the same—Evidence of insolvency of husband competent as tending to show that credit was extended to the wife—Return of justice on appeal inadmissible to contradict statement of counsel in argument to jury of what took place on the trial in justice's court—Proper for court to order counsel to desist from commenting in such argument upon alleged entries in books of account, which, though inquired about on cross-examination, were not made evidence by the introduction of the books.

HOPTONIC COMPANY, DUNSTON v. 372

HORTON v. HUBBARD 123
Specific performance of land contract—Right to not cut

Digitized by Google

PAGE

Horton v. Hubbard—Continued.
off by attachment or execution levy against the vendor after the date of the contract—Such creditors are proper parties—Equity will retain jurisdiction to adjust conflicting claims to the purchase money.

HUBBARD, HORTON v. 123

HUDSON, EDSON v. 450

HUNT v. RUMSEY 136
"Red Lyon Wheat Note"—Good-faith holder—Consideration.

HUNTER v. ROBERTS, THROP & CO. 63
Corporations—Declaring dividends—Equity will not compel, unless it clearly appears that the directors are guilty of fraud or misappropriation of corporate funds, or refuse to declare a dividend from surplus of net profits which can be divided without detriment to the corporate business.

I.

IN THE MATTER OF THE ASSIGNMENT OF THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY 513
Labor debts—Services of a practical miller, for a corporation engaged in the manufacture and sale of flouring-mills and machinery, in going from place to place after sales were made, and putting the machinery in running order, etc., are held to be labor, within Act No. 94, Laws of 1887, which prefers labor debts due from insolvent debtors—Act creates no new liabilities, but merely regulates the distribution of insolvent estates.

IN THE MATTER OF THE PETITION OF RICHARD A. SEYMOUR ... 496

INTERNATIONAL FAIR & EXPOSITION ASSOCIATION OF DETROIT v. WALKER 386
Corporations—Preliminary subscription paper by which signers agreed to take stock in a corporation to be, and which was thereafter, organized, held valid and binding.

Digitized by Google

PAGE

J.

JENNINGS v. MOORE 231

Mortgage—Notes secured by will be paid ratably out of the land—Agreement to give assignee of a portion of the notes, and of a corresponding interest in the mortgage, priority of lien, cannot be shown by parol—Nor will the relative rights of assignor and assignee be affected by a statutory foreclosure by assignee—Where such foreclosure was set aside in a foreclosure suit in equity by the assignor, and a sale of the land decreed with *pro rata* division of the proceeds, the assignee, who had purchased the equity of redemption, is allowed to redeem, and, on failure to do so in six months, sale and distribution to be made under foreclosure decree.

JONES, FORT-STREET UNION DEPOT COMPANY v. 415

JOPP v. KEGEL 50

Appeal—By one of two joint defendants, in behalf of both, from justice's judgment—If co-defendant fails to execute bond, the judgment is unaffected as to him by the appeal.

K.

KALAMAZOO CIRCUIT JUDGE, PALMER v. 528

KAPP, LAZELL v. 36

KEENAN v. CUMMINS 43

Appeal—Credibility of witnesses.

KEGEL, JOPP v. 50

KING v. WELBORN 195

Homestead—May be claimed in premises occupied exclusively for hotel purposes—Erecting house on two lots does not bar homestead rights—If value exceeds $1,500, owner may receive value of exemption—Verbal promise to give a security cannot create a mortgage lien upon a homestead—Can be claimed by a tenant in common.

KNICKERBOCKER v. WILCOX 200

Principal and agent—This case involves the question of the

Digitized by Google

PAGE

Knickerbocker v. Wilcox—Continued.

personal liability of the cashier of a national bank upon an undertaking to indemnify a brother cashier for signing a replevin bond, it being an agreement which the bank could not make—Judgment record—Due proof of the execution of a bond, a copy of which appears in the record, before rendition of judgment, will be presumed in its support—Evidence—Contents of paper beyond the jurisdiction of the court may be shown by secondary evidence—Whether a judgment was secured by fraud and collusion is a question for the jury.

L.

LAMBERT v. WEBER 395

Bona-fide purchaser—Knowledge by vendee, before completing a purchase of land, that third persons were in possession, as tenants, as claimed by the vendor, is sufficient to put him upon inquiry—Deposit of vendee's note in *escrow*, to be delivered when he was given a good title to, and possession of, the land contracted for, is not such a payment as entitles him to the rights of a *bona-fide* purchaser for value—Tender of deed, in this case, is held insufficient, and as amounting to nothing more than notice that the vendors were insisting upon the acceptance of such title as they could convey, and that vendees were required to act promptly if they desired no insist upon a specific performance of the contract, which is decreed in their favor.

LAMPER v. ROBERTS 547

Civil warrant—Affidavit for, held sufficient to give the court jurisdiction.

LAZELL v. KAPP 86

Negligence—Question of held properly submitted to the jury, under *Boick v. Bissell*, 80 Mich. 260.

LONGYEAR v. BUCK 236

Constitutional law—Act No. 214, Laws of 1889, providing for payment of dog tax by township and city treasurers to county treasurer, is constitutional.

Digitized by Google

PAGE

LUTTENTON v. FRITZ 145

Directing verdict—Held proper for want of evidence tending to make out plaintiff's case.

M.

MACOMB v. WILKINSON 486

Evidence—Entry made by a deceased party in a day-book kept by him in the regular course of business is competent evidence—Consideration of promissory note may be shown except as against a *bona-fide* purchaser—Statutory foreclosure sale—Excess paid by purchaser on account of the addition of attorney's fees goes with surplus arising on sale, and not to purchaser—Principal and agent—Principal chargeable with facts known to agent.

MCBRIEN, HATCH v. 159

MCGRAW v. SOLOMON 442

Bona-fide purchaser—Mortgage of lands or chattels, as security for an antecedent debt, will not operate as a purchase for value, or defeat existing equities.

MCKISSON v. DAVENPORT 211

Statute of limitations—How. Stat. § 8709, in so far as it bars foreclosures unless commenced within 15 years after the maturity of mortgage debt, or last payment, is not retroactive—Proviso giving five years in which to commence the foreclosure of such mortgages gives a reasonable time within which to commence such suits or proceedings.

MCLAULIN, AUDITOR GENERAL v. 352

MCNUTT v. DIX 328

Principal and agent—In this case defendant is held to have acted as plaintiff's agent in the purchase from her of land, and to be liable for an excess received by him on its resale.

MEATHE v. MEATHE 150

Divorce—Habitual drunkenness—Same rule applies to wife as to husband.

Digitized by Google

PAGE

MEIER v. CITY BOARD OF CANVASSERS OF DETROIT..... 367

MENZER v. MENZER..... 319

Divorce—Driving husband from homestead, which he had deeded to his wife, which she rented to strangers, and then removed to another city, held extreme cruelty.

MICHIGAN CENTRAL RAILROAD COMPANY, GRAND v..... 564

MICHIGAN LAND & IRON COMPANY, DEER LAKE COMPANY v... 11

MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY, ERICKSON v..... 281

MOGG v. HALL..... 576

Taxes—Trover will not lie against a town treasurer for property seized under a tax roll and warrant fair upon their face—Drain law of 1885—Provision that taxes levied under law of 1881 shall be a personal claim against the land-owner until paid is invalid—Town treasurer is charged with notice of such invalidity, where roll and warrant require the collection from a land-owner of reassessed drain taxes levied under the law of 1881.

MOORE, JENNINGS v..... 231

MORTON, FORT-STREET UNION DEPOT COMPANY v..... 263

MUNRO, PEASE v..... 475

MUSKEGON CITY, RIFENBURG v..... 279

N.

NAGEL v. SCHNEIDER..... 407

Mortgage on building standing on land held by mortgagor under a land contract—Bill to reform, by inserting description of land, dismissed.

NEWKIRK, DURFEE v..... 523

O.

O'CONNER, SEELY v..... 310

O'CONNER, WOLF v..... 301

O'CONNOR, AUDITOR GENERAL v..... 464

Digitized by Google

PAGE

P.

PALMER v. KALAMAZOO CIRCUIT JUDGE 528

Insane persons—If criminals, are governed by 8 How. Stat. chap. 47*a*, and if not, by 8 How. Stat. chap. 46—Order of commitment of female to the asylum by Lenawee county probate judge—Shows sufficient facts to give the court jurisdiction on the basis of her being a resident of the State Industrial Home for Girls, where it recites that it is made upon a hearing on a petition which alleges that the female is such resident, and is insane, and prays for her admission, etc.—Liability of superintendent of asylum to be harassed by a suit for false imprisonment for detaining an inmate on a void commitment entitles him to ask for a review of an order discharging such inmate on *habeas corpus* proceedings—*Habeas corpus*—Writ penetrates the walls of insane asylums as fully and freely as any other place where persons are illegally restrained of their liberty—Return to writ should state, plainly and unequivocally, the authority and the cause of the imprisonment complained of, and, if by virtue of any writ, a copy should be annexed to the return, and the original produced on the hearing—Probate judge is not ousted of jurisdiction because it appears on the hearing that the insane person has not acquired a legal settlement in his county—The desired order should be made, and the expense directed to be paid by his county in the first instance, leaving the question of residence, and of the county liable for support, to be determined under section 25 of Act No. 135, Laws of 1885.

PEASE v. MUNRO 475

Practice in Supreme Court—Sending up stenographer's notes as a bill of exceptions, condemned—Record should be indexed, under rule No. 61 as amended.

PEASLEE v. COLLIER 549

Fraudulent conveyance—Husband and wife—Deed of homestead—Release of dower—Proofs held insufficient to establish fraud charged.

Digitized by Google

PAGE

PEET v. GREAT CAMP OF THE KNIGHTS OF THE MACCABEES... 92

Mutual benefit associations—Administrator of beneficiary, who is also his sole heir, and entitled to insurance, may sue in his own name therefor—Member of subordinate tent not entitled to notice of its suspension, where the constitution, by-laws, or rules of the order do not require notice to be given.

PENDLETON, STEVENS v..... 342

PEOPLE v. BENNETT..... 457

Ordinance—Prohibiting the depositing of refuse matter in alleys, and providing for its removal by the owner, is violated when the deposit is made—Removal of nuisance will not cure such violation—Limiting accumulation of manure by livery-stable keepers in or near their stables, held not a recognition of right to deposit it in the adjacent alleys.

PEOPLE v. HARPER..... 278

Criminal law—Statement by prosecuting attorney that people were not bound by the testimony of a witness which they were bound to introduce, except in so far as it was believed by the jury to be true, is not open to objection—Manslaughter—Failure technically to define in charge cannot be assigned as error, where respondent on his own theory is guilty of that offense—If he claims to be innocent of murder, because of a want of criminal intent, an instruction giving him the benefit of the presumption of innocence, and of a reasonable doubt as to such intent, is sufficient.

PEOPLE v. SULLIVAN..... 355

Liquor traffic—Information for keeping a saloon open contrary to the statute need not state that the respondent is not a druggist—Amendment of information.

PETTIT, SANFORD v..... 499

PHILLIPS v. PHILLIPS..... 259

Antenuptial agreement—Specific performance decreed.

PLATT, CORTLAND MANUFACTURING COMPANY v..... 419

Digitized by Google

PAGE

PORTSMOUTH SAVINGS BANK v. CIRCUIT JUDGE..... 646

Practice in circuit courts—Motion to amend plea by adding an affidavit denying the execution of an instrument sued upon, upon the ground that the question of such execution was fairly raised by the evidence, can only be properly heard and decided by the trial judge to whom the case has been submitted for decision—Such judge may hear and decide the motion, though when entered the county in which suit was tried has been made a part of another judicial circuit—Amendment properly allowed in this case.

POTTER v. SAGINAW UNION STREET RAILWAY..... 285

Corporations—Whether a corporation is exercising a franchise within legislative authority is a question to be inquired into by the State—Equity—Mere apprehension of injury by the substitution by a street railway company of electricity as a motive power will not warrant a perpetual injunction restraining such change—Where granting such relief will cause a far greater loss to defendant than the complainant will suffer, if all of his apprehensions prove true, and he has a remedy at law for the violation of his rights, if he has any, he should pursue such remedy.

PUTNAM v. TINKLER..... 628

Specific performance—The power of the equity court to decree the specific performance of a fully performed land contract is undoubted—Failure of an infant, who succeeds to her father's rights under such a contract, to file such a bill during her minority, will not prevent her doing so after arriving at full age.

Q.

QUINCY VILLAGE, THOMPSON v..... 173

R.

REED, WILMARTH v..... 44

REGENTS OF THE UNIVERSITY OF MICHIGAN, AUDITOR GENERAL v..... 467

Digitized by Google

PAGE

REYNOLDS, AUDITOR GENERAL v. 471

RIBBLE v. STARRAT 140

Negligence case—Request for an instruction in favor of plaintiff upon a given state of facts, which omits the element of contributory negligence, is defective.

RICHARDS v. CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK 508

Fire insurance—Dwelling-house from which a tenant has removed with no intention of returning, and which, after two days of such unoccupancy, is destroyed by fire, is held to have been vacant within the rule laid down in *Bonenfant v. Insurance Co.*, 76 Mich. 653—Question of such vacancy is one of law for the court—Consequent forfeiture of policy not waived by statement of adjuster to the assured that the company considered the house vacant, but were not going to be technical about the matter, coupled with an offer to pay $450 in full of a loss of $900.

RICHARDSON v. RICHARDSON 653

Equity practice—Representatives of a deceased trustee are necessary parties to a bill to reach the fund of which complainants claim to have been defrauded.

RIFENBURG v. CITY OF MUSKEGON 279

Condemnation proceedings—Provision for first publication of a notice of an application for impaneling a jury *at least* thirty days before the day of hearing requires that thirty *full* days shall intervene between those dates.

ROBERTS, AUDITOR GENERAL v. 471

ROBERTS, LAMPER v. 547

ROBERTS, THROP & CO., HUNTER v. 63

RUMSEY, HUNT v. 136

S.

SAGINAW UNION STREET RAILWAY, BARBER v. 299

SAGINAW UNION STREET RAILWAY, POTTER v. 285

SALLIOTTE, DOWLING v. 131

Digitized by Google

PAGE

SANFORD v. PETTIT 499

Chattel mortgage—Mortgagee is held to be a *bona fide* holder for value.

SCHERR v. CITY BOARD OF CANVASSERS OF DETROIT 367

SCHLOSS, HEINEMAN v. 153

SCHNEIDER, NAGEL v. 407

SCHUFFERT v. GROTE 263

Appeal—Order dissolving a preliminary injunction in so far as it interfered with the defendant's right of possession, she being in possession of the land when suit was commenced, and directing restoration of such possession, is not appealable.

SECOND NATIONAL BANK OF MAUCH CHUNK v. DWIGHT 192

Judgment crditors' bill.

SEELY v. O'CONNER 310

See *Wolf v. O'Conner.*

SEYMOUR, IN RE 496

SHAW v. HILL 322

Ejectment—Defendant's employé who lives in a house on the land, but claims no rights in the land, is not a necessary party—A defendant who shows an equitable interest in the land, unconnected with, and independent of, plaintiff's claim of title, may show in defense plaintiff's want of title—In the cases holding that an equitable title cannot be set up against the legal title, the legal title was fully established, and was sought to be overthrown by evidence of such equitable title.

SISSUNG, FIX v. 561

SLOSSON, WOLF v. 543

SMITH, BATES v. 347

SOLOMON, MCGRAW v. 442

SPAULDING v. BLISS 311

Malpractice—Plaintiff, not being an expert, cannot testify to the cause of pain—Charge which treats the question at issue as one of neglect in the care of a broken limb, rather than of injury to the knee, caused by alleged

Digitized by Google

PAGE

Spaulding v. Bliss—Continued.
malpractice in setting the limb, which is the theory of the declaration, is erroneous—Jury bound by testimony of physicians and surgeons in determining whether, on the facts in the case, the treatment of defendant, and appliances used, were proper.

STARRAT, RIBBLE V. 140

STEVENS V. PENDLETON[1] 342

Principal and surety—A change in the terms of an agreement which will operate to discharge a surety must have been made by the intentional act of the original parties—Judgment of circuit judge that surety was discharged is affirmed, but on a rehearing is reversed, which rehearing opinion will be published in volume 85.

STEWART, ABRAHAM V. 7

STILES, AUDITOR GENERAL V. 460

SULLIVAN, PEOPLE V. 355

T.

TEMPLETON, WALES V. 177

THOMPSON V. VILLAGE OF QUINCY 173

Evidence—Of the fracture of plaintiff's arm is admissible under a declaration averring that it was "cut, sprained, bruised, wounded, and injured," etc.—Resolutions of village council ordering repair of sidewalk passed from time to time during the two years preceding an injury caused by its non-repair, are admissible to show knowledge on the part of the village of the condition of the walk—Witness may, in answer to question as to his means of knowledge of such condition, testify that the boards were loose, causing him and others to stumble, but without falling down—Counsel objecting to reference of court in charge to his statements in argument to the jury must show that he was misquoted.

THREE RIVERS NATIONAL BANK V. GILCHRIST 258

Evidence—Authority of husband to act for his wife cannot be shown by his declarations—Nor will it be pre-

[1] See 48 N. W. Rep. 478 for rehearing opinion.

Digitized by Google

PAGE

Three Rivers National Bank v. Gilchrist—Continued.
sumed in a given case from his having acted for her in other matters.

TINKLER, PUTNAM v. 628

TOLEDO, SAGINAW & MACKINAW RAILROAD COMPANY v. CAMPAU 31, 33

Condemnation proceedings—Special questions to jury or commissioners, not authorized—Sufficiency of map and survey to identify property sought to be acquired is to be determined by the court on the application for the appointment of commissioners.

TORRENT, BENEDICT v. 181

TORRENT, WINTERMUTE v. 555

TREAT, WRIGHT v. 110

TRIBUNE PUBLISHING COMPANY, WELCH v. 661

V.

VILLAGE OF QUINCY, THOMPSON v. 173

VOIGT, ALLIS v. 537

W.

WAGAR, BITZER v. 223

WAGAR, BJORKQUEST v. 226

WALDRON, HIRSHFIELD v. 116

WALES v. TEMPLETON 177

Will—Construction of—Description of lands.

WALKER, INTERNATIONAL FAIR & EXPOSITION ASSOCIATION OF DETROIT v. 386

WARD, CALDWELL v. 13

WAYNE CIRCUIT JUDGE, WERTHEIMER v. 56

WAYNE CIRCUIT JUDGE, WILLCOX v. 1

WEBER, LAMBERT v. 395

WEIDNER, ATKINSON v. 412

WELBORN, KING v. 195

Digitized by Google

PAGE

WELCH v. TRIBUNE PUBLISHING COMPANY 661

Libel and slander—To charge that a jury have perjured themselves in rendering a certain verdict is libelous—In such a case the plaintiff cannot be questioned concerning the verdict, or his motives or reasons for its rendition, such questioning falling within the prohibition of How. Stat. § 7608, abolishing the common-law remedy of attaint upon untrue verdicts—Under a notice of jurisdiction in such a case, the fact of the juror's being influenced by aught save the evidence, the instructions of the court, and the arguments of counsel is not in issue—Written request of jurors for retraction of alleged libelous charge is inadmissible, unless shown to have reached the defendant—Publication of libel, with comments, after commencement of suit, may be shown as showing malice.

WELLMAN v. CHICAGO & GRAND TRUNK RAILWAY COMPANY .. 592

Railroad companies—It is for the Legislature to determine what are reasonable maxium rates of charges for the transportation of passengers and freight, under section one of article 19*a* of the Constitution—Graded fare law of 1889, which assumes to do this, is constitutional.

WERTHEIMER v. WAYNE CIRCUIT JUDGE 56

Landlord and tenant—Consent to occupancy of leased premises by subtenant, for a specified business, is a restrictive waiver of condition not to sublet or to carry on any other business than that specified in the lease, but applies only to such subtenant and business—Covenants in lease, affecting mode of occupation and enjoyment, run with the land, and their violation by assignee, though not named, may be enjoined.

WHITCOMB, ARNOLD v. 19

WIDIMAN v. BROWN 241

Consideration—Agreement to pay that which the promisor is legally liable to pay does not constitute a consideration for a new promise to perform the same contract.

WILCOX, KNICKERBOCKER v. 200

WILKINSON, MACOMB v. 486

Digitized by Google

PAGE

WILLCOX v. WAYNE CIRCUIT JUDGE 1

Divorce—Act No. 137, Laws of 1887, requiring prosecuting attorneys to appear in divorce suits in certain cases, construed.

WILMARTH v. REED 44

Estates of deceased persons—Court distinguish this case from *Rough v. Womer*, 76 Mich. 381, and hold that administrator is entitled to possession of the real estate for the purpose of collecting rents and profits, etc.

WINTERMUTE v. TORRENT 555

Bills and notes—If indorsed to an agent for collection, he may sue thereon in his own name, if his indorser could have maintained the action—Partnership—Managing partner prohibited from running the firm in debt—Has no power to give firm note to himself as guardian for money belonging to his wards, and used in the partnership business.

WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK v. FILER 496

Vendor's lien—Acceptance of note of a third person for a portion of the purchase money is a waiver *pro tanto*—Principal and agent—Purchase of land contract by the president of a corporation is held to have been made in his individual interest.

WOLF v. O'CONNER 301

Assignment for benefit of creditors—Deed made prior to passage of statute regulating assignments, purporting to convey all of the grantor's property in trust for the benefit of his creditors (with preferences), and signed and acknowledged by grantor and grantee, and recorded, is held upon its face to be a valid conveyance—Joining in such a deed, and placing it upon record, is conclusive of acceptance by grantees, to whom the legal title to the land therein described passes—Creditor cannot sell the land on execution in the face of such a deed, and purchase it in on the sale, and then seek to set deed aside as fraudulent as to creditors, or because of the failure of the assignees to execute the trust.

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WOLF v. SLOSSON 543

Assignment for benefit of creditors—Cannot be set aside at the suit of an attachment or execution creditor, by proof of an unlawful preference, or of any fraud in the matter of such assignment.

WRIGHT v. TREAT 110

Liquor traffic—Objection that a declaration averring the sale of liquor to certain persons whereby the defendant, in an unlawful manner, caused them to be greatly intoxicated, is defective for want of a direct averment that they were intoxicated persons, or persons in the habit of becoming intoxicated, should be raised by demurrer—If not, and if proofs tend to show such intoxication, the declaration should be amended to cover such proofs, and if not it will be considered as amended in the appellate court—Liability of sureties on liquor bond continues during the year for which it is filed—Nor can they relieve themselves by removing from corporation where business is carried on, nor will they be relieved by notice from county treasurer to principal to file new bond and in the mean time to discontinue his business—In suit by wife to recover damages for being thrown from a carriage, in which she was riding with her husband, by reason of the negligence of intoxicated persons, the contributory negligence of the husband does not enter into the issue.

Digitized by Google

MICHIGAN CASES CITED.

A.

	PAGE
Advertiser & Tribune Co. v. Detroit, 43 Mich. 116	495
Aetna Ins. Co. v. Resh, 40 Mich. 241	135
Allen v. Allen, 47 Mich. 74	135
Arnold v. Nye, 23 Mich. 286, 293	280
Attorney General v. Rice, 64 Mich. 385	18
Auditor General v. Stiles, 83 Mich 460	472
Aveling v. Association, 72 Mich. 7	95
Avery v. East Saginaw, 44 Mich. 587	464

B.

Bachelder v. Brown, 47 Mich. 366	560
Bailey v. Publishing Co., 40 Mich. 257	589
Baker v. Insurance Co., 51 Mich. 243	99
Baker v. Pierson, 5 Mich. 456	495
Bateman v. Blake, 81 Mich. 227	364
Bates v. Association, 51 Mich. 587	99
Beach v. Botsford, 1 Doug. 199	578
Beach v. White, Walk. Ch. 495	191
Beard v. Clippert, 63 Mich. 716, 719, 258,	545
Becker v. Insurance Co., 48 Mich. 610	100
Beecher v. Circuit Judges, 70 Mich. 363	651
Bertram v. Cook, 32 Mich. 521	324
Bertram v. Cook, 44 Mich 397	324
Big Rapids v. Comstock, 65 Mich. 78	298
Bird v. Perkins, 33 Mich. 28, 578,	581
Blackwood v. VanVleet, 11 Mich. 252	13
Blake v. Cornwell, 65 Mich. 467	298
Boick v. Bissell, 80 Mich. 260	39
Bond v. Railroad Co., 62 Mich. 650	255
Bonenfant v. Insurance Co., 76 Mich. 668	511
Bourreseau v. Journal Co., 63 Mich. 25	591
Boyce v. Sebring, 66 Mich. 210, 211, 216, 474,	581
Boxheimer v. Gunn, 24 Mich. 372	449
Brewer v. Railway Co., 56 Mich. 620	571
Brockway v. Innes, 39 Mich. 47	518
Brockway v. Patterson, 72 Mich. 122	115
Brockway v. Petted, 79 Mich. 620	115
Bronson v. Bruce, 59 Mich. 471	589
Buchanan v. Log Running Co., 48 Mich. 364	298
Burt v. Thomas, 49 Mich. 462	367
Butts v. Davis, 50 Mich. 310	364
Byles v. Genung, 52 Mich. 504	578

C.

Campbell v. White, 22 Mich. 178	122
Canfield v. Shear, 49 Mich. 313	367
Castner v. Insurance Co., 50 Mich. 273	99
Chapman v. Morgan, 55 Mich. 126	130
Chicago & Grand Trunk Ry. Co. v. Turner, 79 Mich. 133	609
Chicago & Northeastern R. R. Co. v. Sturgis, 44 Mich. 538	520
Clark v. Axford, 5 Mich. 182, 187	581
Cleaver v. Bigelow, 61 Mich. 47	197
Commercial Nat'l Bank v. Mosser, 57 Mich. 389	308
Comstock v. Grand Rapids, 54 Mich. 641	110
Conrad v. Long, 33 Mich. 88	327
Cook v. Bertram, 37 Mich. 125	324
Cook v. Johnston, 58 Mich. 437	571
Cooper v. Ulmann, Walk. Ch. 251	235
Coots v. Detroit, 75 Mich. 631, 632	575
Coots v. Radford, 47 Mich. 37	545
Coquard v. Boehmer, 81 Mich. 445	281
Couse v. Tregent, 11 Mich. 65	350

Digitized by Google

PAGE

Cox v. Commissioner, 83 Mich. 193. 281
Cranson v. Smith, 47 Mich. 189..... 309

D.

Daily v. Litchfield, 10 Mich. 36..... 130
Denton v. Smith, 61 Mich. 431..... 139
Detroit Daily Post Co. v. McArthur, 16 Mich. 447..... 527
Dikeman v. Arnold, 71 Mich. 656; 78 Id. 455..... 219
Donkersley v. Levey, 38 Mich. 57.... 85
Dragoo v. Dragoo, 50 Mich. 575..... 638
Duncan v. Seeley, 34 Mich. 369..... 428
Dunlap v. Gleason, 16 Mich. 158..... 359

E.

East Saginaw & St. Clair R. R. Co. v. Benham, 28 Mich. 459..... 272
Eaton v. Peck, 26 Mich. 57..... 280
Edwards v. McKernan, 55 Mich. 523. 449
Edwards v. Nelson, 51 Mich. 121.... 364
Elliott v. VanBuren, 33 Mich. 56.... 527
Emerson v. Atwater, 7 Mich. 13..... 495
English v. Carney, 25 Mich. 178..... 235

F.

Fairfield v. Barbour, 51 Mich. 57.... 633
Fearey v. Cummings, 41 Mich. 376.. 156
Fechheimer v. Peirce, 70 Mich. 440. 255
First Nat'l Bank v. St. Joseph, 46 Mich. 526..... 468
First Nat'l Bank v. Watkins, 21 Mich. 483.....578, 582
Fisher v. Provin, 25 Mich. 347..... 134
Flower v. Witkovsky, 69 Mich. 371. 115
Folkerts v. Standish, 55 Mich. 463.. 156
Fort-street Union Depot Co. v. Morton, 83 Mich. 285..... 416
Foster v. Scripps, 39 Mich. 379..... 590
Freeman v. Bank, Walk. Ch. 62..... 191
Fuller v. Hasbrouck, 46 Mich. 78... 546
Fuller v. Sweet, 80 Mich. 241..... 324

G.

Gardner v. Railroad Co., 58 Mich. 584..... 571
Geiges v. Greiner, 68 Mich. 153..... 327
Goodrich v. McDonald, 77 Mich. 486 139
Gorman v. Judge, 27 Mich. 138..... 215
Goulin v. Bridge Co., 64 Mich. 190.. 571
Grand Rapids v. Railroad Co., 58 Mich. 646..... 272

H.

Hagenbuch v. Howard, 34 Mich. 1. .....578, 582

PAGE

Haldane v. Sweet, 55 Mich. 196..... 249
Hall v. Rood, 40 Mich. 46..... 298
Hamilton's Case, 51 Mich. 174..... 536
Hanchett v. McQueen, 33 Mich. 25. 130
Hansen v. Prince, 45 Mich. 519..... 249
Harrett v. Kinney, 44 Mich. 457..... 327
Harrison v. Metz, 17 Mich. 377..215, 217
Hatch v. Squires, 11 Mich. 185..... 255
Hilsendegen v. Scheich, 55 Mich. 468 31
Hunn v. Railroad Co., 78 Mich. 513. 576

I.

Illick v. Railroad Co., 67 Mich. 632. 571
In re Ortmann, 80 Mich. 67..... 497
Isabelle v. Iron Cliffs Co., 57 Mich. 120..... 191

J.

Jacobs v. Miller, 50 Mich. 119..... 134
Jenny v. Perkins, 17 Mich. 28..... 215
Jewett v. Petit, 4 Mich. 508..... 215
Jochen v. Tibbells, 50 Mich. 36..324, 328
Johnston Harvester Co. v. Miller, 72 Mich. 265..... 139
Jones v. Avery, 50 Mich. 326..... 520

K.

Kendall v. Bishop, 76 Mich. 634..... 545
Kinyon v. Young, 44 Mich. 339..... 633
Kohl v. Lynn, 34 Mich. 360..... 449
Kornemann v. Monaghan, 24 Mich. 36..... 255
Kruger v. LeBlanc, 75 Mich. 424.... 197
Kwiotkowski v. Railway Co., 70 Mich. 549..... 572

L.

Lamb v. Hinman, 46 Mich. 112..... 633
Lane v. Commissioner, 89 Mich. 736. 281
Langley v. Ross, 55 Mich. 163..... 31
LeRoy v. Railway, 18 Mich. 234..... 578
Livingston v. Burroughs, 33 Mich. 511..... 527
Lozo v. Sutherland, 38 Mich. 168.... 197
Ludwig v. Stewart, 33 Mich. 27..... 215
Lyon v. Railroad Co., 31 Mich. 429.. 571

M.

Manistee, etc., R. R. Co. v. Fowler, 73 Mich. 217..... 35
Manwaring v. Powell, 40 Mich. 371. 135
Matta v. Railway Co., 69 Mich. 109. 571
McAllister v. Free Press Co., 76 Mich. 356..... 589
McCurdy v. Clark, 27 Mich. 447..... 235

Digitized by Google

PAGE

McGinnis v. Bridge Co., 49 Mich. 466 578
McGraw v. Solomon, 83 Mich. 442.. 456
McMillan v. Cheese Factory, 28 Mich. 544..... 252
Messmore v. Huggard, 46 Mich. 558. 309
Millard v. Truax, 47 Mich. 251..... 493
Miller v. Cornwell, 71 Mich. 270.... 298
Mills v. Van Camp, 41 Mich. 645.... 364
Miner v. Association, 63 Mich. 338.. 99
Moore v. Hall, 48 Mich. 143..... 560
Moore v. Mandelbaum, 8 Mich. 442. 333
Moran v. Palmer, 13 Mich. 368..... 13
Morgan v. Railroad Co., 57 Mich. 431 495
Morris v. Hoyt, 11 Mich. 17..... 130
Morse v. Byam, 55 Mich. 594..... 324
Moser v. White, 29 Mich. 59, 60..... 474
Munson v. Ellis, 56 Mich. 331..... 546
Mynning v, Railroad Co., 64 Mich. 93 571

N.

Nelson v. McArthur, 38 Mich. 207.. 601
Neumann v. Mining Co., 57 Mich. 97 364

O.

Orr v. Shraft, 23 Mich. 260..... 197

P.

Palmer v. Palmer, 36 Mich. 487..... 215
Parsons v. Judge, 37 Mich. 287, 289, 290..... 215, 217
Peabody v. McAvoy, 23 Mich. 526.. 252
Peck v. Miller, 39 Mich. 594..... 519
Peninsula Iron & Lumber Co. v. Crystal Falls, 60 Mich. 510..... 110
Peninsular Ry. Co. v. Duncan, 28 Mich. 139.....392, 393
People v. Board, 11 Mich. 225..... 333
People v. Lyons, 49 Mich. 78..... 428
People v. McElroy, 72 Mich. 446.... 18
People v. Robbins, 70 Mich. 132..... 357
People v. Salem, 20 Mich. 503..... 626
Perrin v. Lepper, 34 Mich. 292..... 249
Pickard v. Kleis, 56 Mich. 604, 609... 31
Platt v. Highway Com'r, 38 Mich. 247..... 194, 281
Polhemus v. Bank, 37 Mich. 44..... 652
Potter v. Street Ry., 83 Mich. 285... 299
Powers' Appeal, 29 Mich. 504..... 281
Powers v. Russell, 26 Mich. 179..... 122
Price v. Hopkin, 13 Mich. 318..... 215
Proctor v. Bigelow, 38 Mich. 282.... 215

R.

Regents v. Board of Education, 4 Mich. 213..... 468
Regents v. Detroit Young Men's Society, 12 Mich. 163..... 469

PAGE

Ribble v. Lawrence, 51 Mich. 569... 256
Ribble v. Starrat, 79 Mich. 204..... 140
Riley v. Conner, 79 Mich. 497..... 222
Roberts v. Miller, 32 Mich. 289..... 483
Rogers v. Odell, 36 Mich. 411..... 130
Ross v. Leggett, 61 Mich. 453, 458... 527
Rough v. Womer, 76 Mich. 381..... 49
Ryan v. Fralick, 50 Mich. 483..... 55
Ryder v. Flanders, 30 Mich. 336.... 327

S.

Sackrider v. Supervisors, 79 Mich. 59..... 18
Scripps v. Reilly, 38 Mich. 10, 25.... 527
Sears v. Smith, 2 Mich. 244..... 497
Seymour v. Peters, 67 Mich. 415.... 258
Shadock v. Plank-road Co., 79 Mich. 7..... 175
Shaw v. Hill, 79 Mich. 90..... 324
Shepard v. Cross, 33 Mich. 96..... 197
Sherrid v. Southwick, 43 Mich. 518. 197
Shue v. Highway Com'r, 41 Mich. 638..... 194
Sibley v. Smith, 2 Mich. 486..... 581
Skinner v. Shannon, 44 Mich. 87.... 197
Smith v. Auditor General, 20 Mich. 398..... 215
Smith v. Bank, 17 Mich. 479.....578, 582
Smith v. Lloyd, 29 Mich. 382, 389.... 249
Smith v. Sherwood Tp., 62 Mich. 159 176
Smith v. Thompson, Walk, Ch. 1... 191
Springett v. Colerick, 67 Mich. 362.. 358
Stambaugh v. Snoblin, 32 Mich. 226. 215
Stanton v. Hitchcock, 64 Mich. 328.. 197
Stevenson v. Jackson, 40 Mich. 702.. 130
Steward v. Stevens, Har. Ch. 169... 191
Stilson v. Gibbs, 53 Mich. 280..... 526
Stone v. Welling, 14 Mich. 514..... 449

T.

Tabor v. Cook, 15 Mich. 324..... 18
Taft v. Taft, 73 Mich. 502..... 633
Tarbell v. Millard, 63 Mich. 250..... 191
Taylor v. Adams, 58 Mich. 187..... 42
Taylor v. Commissioner, 39 Mich. 739..... 281
Taylor v. Young, 56 Mich. 285..... 495
Ten Eyck v. Wing, 1 Mich. 40..... 215
Terry v. Tuttle, 24 Mich. 206..... 495
Tharp v. Allen, 46 Mich. 389..... 197
Thayer v. Swift, Har. Ch. 430..... 191
Thurston v. Prentiss, 1 Mich. 198... 130
Tilden v. Barnard, 43 Mich. 376..... 209
Tillman v. Shackleton, 15 Mich. 447. 123
Toledo, etc., R. R. Co. v. Campau, 83 Mich. 31..... 34

Digitized by Google

	PAGE
Toledo, A. A. & G. T. Ry. Co. v. Dunlap, 47 Mich. 466	417
Toll v. Wright, 37 Mich. 93	215
Treasurer v. Bunbury, 45 Mich. 79	364
Tupper v. Kilduff, 26 Mich. 394	652
Tuttle v. Campbell, 74 Mich. 660	350
Tweed v. Metcalf, 4 Mich. 579...578,	581
Twiss v. George, 33 Mich. 253	633

V.

VanHorn v. People, 46 Mich. 183	238
Vinton v. Beamer, 55 Mich. 559	135
Vos v. Dykema, 26 Mich. 399	249

W.

Walcott v. People, 17 Mich. 69	604
Warren v. Cole, 15 Mich. 273	526
Wasey v. Mahoney, 55 Mich. 194	42
Watson v. Watson, 53 Mich. 168	526
Welch v. Ware, 32 Mich. 77	527
Welch v. Whelpley, 62 Mich. 15	633
Wheaton v. Beecher, 66 Mich. 310...589,	590
Whiting v. Butler, 29 Mich. 122	327
Willard v. Magoon, 39 Mich. 278, 280	255
Williams v. Mears, 61 Mich. 86	474
Williams v. Saginaw, 51 Mich. 120	110
Wilson v. Bowen, 64 Mich. 133	526
Woods v. Burke, 67 Mich. 674	209
Wood v. Thomas, 38 Mich. 686	578
Woodward v. Clark, 15 Mich. 104	130

Y.

Yale v. Stevenson, 58 Mich. 537	327
Yelverton v. Steele, 36 Mich. 62	474
Youngblood v. Sexton, 32 Mich. 414	604
Young v. Iron Co., 65 Mich. 111	384

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OCTOBER TERM, 1890.*

JAMES V. D. WILLCOX, PROSECUTING ATTORNEY OF WAYNE COUNTY, v. GEORGE S. HOSMER, CIRCUIT JUDGE OF WAYNE COUNTY.

Divorce—Services of prosecuting attorney.[1]

1. It is for services in *introducing* evidence, appearing at the hearing, and *opposing* the granting of a decree of divorce that the statute (Act No. 137, Laws of 1887) allows the prosecuting attorney five dollars, payable by the county treasurer upon the certificate of the circuit judge that such services have been rendered.

   So *held*, where a prosecuting attorney entered his appearance in a divorce suit, and, after receiving a copy of the bill of complaint, served a notice on the complainant's solicitor that in his judgment the interest of the child and the public good required that he be present at the taking of the testimony and at the hearing of the cause, with a view of contesting the same. The testimony was taken in open court, and the assistant prosecuting attorney appeared with the consent of the court, and examined the witnesses, and at the conclusion of the hearing notified the court that he was satisfied from *such* testimony that the statutory reasons did not exist for opposing the granting of a decree. The judge refused to give the statutory certificate, on the ground that the services rendered were not such as the statute contemplated, which decision is sustained by the Supreme Court.

2. Act No. 137, Laws of 1887, imposing certain duties upon prosecuting attorneys in divorce cases where there are children under fourteen years of age, is construed as follows:

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*Continued from Vol. 82.

[1] For full digest of points decided, see *Table of Cases Reported.*

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a—The statute is *mandatory* that the prosecuting attorney enter his appearance, and thus secure a copy of the bill and notice of all further proceedings in the case.

b—After receiving such copy, he is to exercise his judgment whether the interest of such child or children, or the public good, requires further action on his part, and to that end the duty of making a proper investigation to obtain facts upon which his judgment can act is laid upon him as a *salaried* officer.

c—The act does not presuppose that he will find it necessary in *all* cases to enter a contest, and oppose the granting of a decree; but this is only required when he is satisfied from *such* investigation that the statutory reasons exist for such action on his part.

d—The care and custody of the children, and the allowances to be made in their behalf, in case a divorce is granted, are matters *exclusively* for the court, and do not come within either the letter or spirit of the statute.

e—The statute does not contemplate a mere *pro forma* appearance at the taking of testimony *by the parties*, and an examination of *their* witnesses, in order to decide if the prosecuting attorney will oppose a decree, but requires a real and *bona fide* contest upon evidence introduced for the purpose of showing that the interests of the children require that a divorce shall not be granted. He is not precluded from examining the parties' witnesses with a view to establishing *that* fact; and in many cases, and perhaps in nearly all, such examination may be the only means of obtaining the necessary information.

f—The statute permits the court to order an examination of the parties, and the prosecuting attorney may find it necessary to apply to the court for such order.

g—While the act implies a previous investigation to enable the prosecuting attorney to form his judgment, it fails to provide him with any compulsory means of obtaining information. He cannot send for persons or papers, nor compel the attendance of witnesses before himself, but is left to such means as a private person has of obtaining information respecting the affairs of others: and hence it may be that the only reliable information he can obtain is to be secured when witnesses are examined in the cause, and he must *then* determine whether the interests of the children or the public good requires him to oppose the granting of a decree.

h—It is for services in introducing evidence, appearing at the hearing, and opposing the granting of a decree of divorce that the statute allows the pittance of five dollars, to be paid from the county treasury,—a sum so greatly inadequate to

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compensate the officer for the honest discharge of his duty as to lead to the inference that the Legislature intended that the larger part of the duty should be performed under his *salary* as prosecuting attorney.

i—The public good requires that there shall be no collusive divorces where bills are filed or not defended by some understanding or agreement between the parties. *Here* the statute also requires the prosecuting attorney to investigate, and, if he is satisfied that the proceedings are collusive, he should contest the granting of a divorce.

j—The statute seems to require, by implication, that the prosecuting attorney should acquaint the court of his determination to contest the granting of a divorce, and obtain its consent, by an order duly entered, to such contest; and in such a case, when he has introduced evidence, appeared at the hearing, and opposed the granting of a decree, he is entitled to have his services certified by the circuit judge, whether successful in his opposition or not.

Mandamus. Submitted October 14, 1890. Denied October 31, 1890.

Relator applied for *mandamus* to compel respondent to certify to the statutory fee allowed by Act No. 137, Laws of 1887, for services in a divorce case. The facts are stated in the opinion.

Henry M. Duffield, for relator.

B. W. Huston, Attorney General, for respondent.

CHAMPLIN, C. J. Relator is the prosecuting attorney of Wayne county. On February 10, 1890, Annie Decarski filed her bill of complaint in the circuit court for the county of Wayne in chancery against Frederick Decarski, praying for a divorce from the bonds of matrimony. The bill states that there was one child living, the issue of such marriage, between two and three years of age. Relator entered his appearance in said cause, and an order for a copy of the bill of complaint. He was served with a copy of the bill on March 15, 1890, and on May 16 he

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served a notice upon the complainant's solicitor that in his judgment the interest of the child and the public good required that he be present at the taking of testimony and at the hearing of the cause, with a view of contesting the same. On July 21, witnesses were produced, and the testimony taken in open court before Hon. George S. Hosmer, circuit judge. The assistant prosecuting attorney, by and with the consent of the court, appeared at said time, and examined witnesses in the cause; and at the conclusion of the testimony said assistant, being satisfied from such testimony that the interest of said child and the public good did not require that he should further contest the granting of a decree in said cause, so stated to the court. Afterwards, and on October 3, relator presented to said judge a bill against the county of Wayne for five dollars, and asked the circuit judge for his certificate that such services had been performed, and he refused so to certify on the ground that the statute did not authorize such bills for such services as those above described.

The statute (Act No. 137, Laws of 1887) reads as follows:

"Every bill of complaint filed shall set forth the names and ages of all children of the marriage, and when there are children under fourteen years of age a copy of subpœna issued in the cause shall be served upon the prosecuting attorney of the county where suit is commenced, and it shall be the duty of said prosecuting attorney to enter his appearance in said cause, and, when in his judgment the interest of said children or the public good so require, he shall introduce evidence, and appear at the hearing, and oppose the granting of a decree of divorce. For every case which the prosecuting attorney contests by and with the consent of the court he shall receive the sum of five dollars, to be paid by the county treasurer upon the certificate of the circuit judge that such services have been performed."

The statute is mandatory upon the prosecuting attorney

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to enter his appearance in the cause. This secures to him a copy of the bill, and notice of all further proceedings. After receiving a copy of the bill, he is next to exercise his judgment as to whether the interest of the children, if any there be under fourteen years of age, or the public good, requires him to do anything further. To enable him to exercise his judgment, it is necessary that he should make a proper investigation to obtain facts upon which his judgment can act. This duty is laid upon him as a public salaried officer. The act does not presuppose that he will find it necessary in all cases to enter a contest, and oppose the granting of a decree. This is only required when he is satisfied from his investigation of the facts either that the interest of the children requires that he shall oppose the granting of a divorce or that the public interest so requires. The care and custody of the children, the allowances to be made in their behalf, in case a divorce is granted, are matters exclusively for the court, and do not come within either the letter or spirit of the statute. The marriage relation is of so intimate and delicate a nature, and the welfare of the children of the marriage is so closely connected and involved in the preservation or dissolution of the marriage, that the Legislature has seen fit to make it the duty of the prosecuting attorney to investigate, and, if in his judgment their interest requires that there should be no divorce, he shall introduce evidence, appear at the hearing, and oppose the granting of a decree.

The statute does not contemplate a mere *pro forma* appearance at the taking of testimony by the parties, and an examination of their witnesses, in order to see if he will oppose a decree, but a real and *bona fide* contest upon evidence introduced for the purpose of showing that the interests of the children require that a divorce shall not be granted. He is not precluded from examining the

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parties' witnesses with a view to establish the fact. In many cases, perhaps in nearly all, such examination may be the only means of his obtaining information. The statute permits the court to order an examination of the parties, and the prosecuting attorney may find it necessary to apply to the court for such order. While the law implies a previous investigation to enable the prosecuting attorney to form his judgment, it fails to provide him with any compulsory means of obtaining information. He cannot send for persons and papers. He cannot compel the attendance of witnesses before himself, but is left to such means as one private person has of obtaining information respecting the affairs of others; and hence it may be that the only reliable information he can obtain is when witnesses are examined in the cause, and he must then determine whether the interest of the children or the public good requires him to oppose the granting of a decree.

In the case before us, the prosecuting attorney, after receiving a copy of the bill, determined that, in his judgment, the interest of the children and the public good required that he be present at the taking of the testimony and at the hearing of the cause, with a view of contesting the same. Such is not the requirement of the statute. The judgment which the statute requires him to form and act upon is that the interest of the children or the public good requires him to appear and oppose the granting of a decree of divorce; and it is for services in introducing evidence, appearing at the hearing, and opposing the granting of a decree of divorce that the statute allows the pittance of five dollars, to be paid from the public treasury of the county,—a sum so greatly inadequate to compensate the officer for the honest discharge of his duty as to lead to the inference that the Legislature intended that the larger part of the duty should be per-

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formed under the salary paid him as prosecuting attorney.

The public good requires that there shall be no collusive divorces where bills are filed or not defended by some understanding or agreement between the parties. Here the statute also requires him to investigate, and, if he is satisfied that the proceedings are collusive, he should contest the granting of a divorce. The statute also seems to require, by implication, that he should acquaint the court of his determination to contest the granting of a divorce, and obtain the consent of the court by an order duly entered thereto. And in such case, when he has introduced evidence, appeared at the hearing, and opposed the granting of a decree of divorce, he is entitled to have his services certified by the circuit judge, whether he has been successful in his opposition or not. Such is the construction which we place upon the statute.

The services of relator not having been such as the statute required, the *mandamus* must be denied.

The other Justices concurred.

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ALFRED W. ABRAHAM v. MARTHA F. STEWART.

Land contract—Conditions as to building—Deed—Specific performance.

1. A land contract contained a clause requiring the *erection* by the vendee on the premises of a dwelling-house of a specified character and description, to be located a certain distance from the street line, on which street the vendor owned other property. It was also provided that the deed to be executed on performance of the vendee's covenants was to be subject to said house-line and building restrictions, which are held complied with by the vendee by *moving onto the land* a house of

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the agreed character and dimensions, and placing the same in the position agreed upon as regards the street line.

2. In such a case the vendor is entitled to have the like conditions inserted in his deed of the premises, and to insist upon their performance so long as they are of any benefit to him or his grantees.

Appeal from Wayne. (Reilly, J.) Argued October 15, 1890. Decided October 31, 1890.

Bill for specific performance of a land contract. Defendant appeals. Decree modified and affirmed. The facts are stated in the opinion.

Palmer & Palmer, for complainant, cited no authorities.

James H. Pound, for defendant, contended:

1. For a decision upon the question that an old house moved does not come within the terms of a house erected, arising under a mechanics' lien law, counsel cited *Trask v. Searle,* 121 Mass. 229; and also cited *McGary v. People,* 45 N. Y. 153; and otherwise contended for the doctrine stated in the opinion.

GRANT, J. The bill was filed in this cause to compel the specific performance of a contract to convey land. The contract contains the following clauses:

"And that, as part and further consideration of the sale as hereby made, the party of the second part shall, within ——— years from date, erect on said lot a suitable dwelling-house at least two stories high, the same to be of not less than eighteen-foot posts and to cost not less than ——— dollars; said dwelling to be not less than twenty-feet from the front line of said lot; and, on taking possession of said lot, shall put, keep, and maintain a sufficient fence around said lot. * * * * *

"And on the performance of all the conditions to be done and performed at the time and manner above mentioned and specified, on the part and behalf of the said party of the second part [complainant], the party of the first part [defendant] agrees to execute, or cause to be executed, to the party of the second part a good and sufficient

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warranty deed for the said land; subject, however, to the house-line and building restrictions herein mentioned; to be delivered on the surrender of this duplicate contract."

The price has been paid, a house moved onto the lot and placed upon the house-line, as provided by the contract. Complainant now claims that he has complied with the contract, and that he is entitled to a deed free from any house-line or building restrictions. Decree was entered in accordance with this view, and defendant appeals.

The agreement to erect a house has been complied with by moving onto the premises a house of the dimensions and character specified. It was not necessary to build a new house. The complainant has also complied with the contract in placing the house upon the line agreed upon. If a deed had been given with these restrictions, before the erection of the house no question would arise until the owner of the lot should propose to build otherwise. The building having been erected, is the defendant entitled to have the restrictions expressed in the deed, and thus create a perpetual servitude upon the land? Such restrictions are common, and are sustained by the courts. *Linzee v. Mixer,* 101 Mass. 512; *Peck v. Conway,* 119 Id. 546; *Sanborn v. Rice,* 129 Id. 395. In *Peck v. Conway,* the covenant was that no building should be erected upon the land conveyed, and was held valid. A deed with such restrictions in it as are contained in the contract in the case at bar would not give to the grantee the right to build a house in accordance therewith, and immediately thereafter remove it to the front line of the lot, or to tear it down or remove it from the lot, and erect another building upon the front line. Complainant by his deed can obtain no different or greater rights than

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those provided for in the contract. If the intention of the parties is clearly expressed in the contract, courts will enforce it, unless the restrictions or conditions are within How. Stat. § 5562, which provides:

"When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded," etc.

It would be unreasonable to suppose these parties contracted that, immediately upon the erection of the building, the complainant might move it beyond the line, or that he might erect a dwelling-house of the dimensions called for and immediately remove it and erect one that would not fulfill the terms of the agreement. These conditions may be of actual and substantial benefit to the defendant. It is clear that the deed was to be made subject to them. They are such as she had a right to make as a condition to the grant. It is admitted that the defendant owned other lands upon the street. The intention of such benefits is therefore apparent. It is entirely possible that the time may come when the maintenance of these conditions will be of no benefit to defendant or her grantees. In such case complainant and his grantees would no longer be compelled to maintain them. That is a question for future consideration. Courts will not compel the observance of restrictions and conditions when they have ceased to be of any benefit. We think the defendant entitled to have these rights, under the contract, preserved in her deed. There is no difficulty in finding apt words in which to express them. The agreement to fence, contained in the contract, has been substantially complied with. But the deed was not to be made subject to any agreement to maintain fences in future.

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The decree must be modified in accordance with the views above expressed.

Inasmuch as the defendant refused to execute a deed for other reasons than the above, which we regard as unfounded and frivolous, she will not be allowed costs.

CHAMPLIN, C. J., CAHILL and LONG, JJ., concurred. MORSE, J., did not sit.

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THE DEER LAKE COMPANY (A CORPORATION) v. THE MICHIGAN LAND & IRON COMPANY (LIMITED).

Bill to quiet title—Remedy at law.

In this case it is held that complainant has an adequate remedy at law, and that equity has no jurisdiction over the controversy, and that it would be improper to express any opinion upon the other questions presented.

Appeal from Marquette. (Steere, J.) Argued October 15, 1890. Decided October 31, 1890.

Bill to remove a cloud from complainant's title to certain real estate caused by a reservation in a deed, etc. Defendant appeals. Reversed, and bill dismissed. The facts are stated in the opinion.

E. E. Osborn, for complainant.

Ball & Hanscom (*B. J. Stevens*, of counsel), for defendant.

CHAMPLIN, C. J. The bill of complaint was filed in this case to remove a cloud from complainant's title to certain real estate.

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The complainant states that both parties claim under a common grantor, namely, the Marquette & Ontonagon Railroad Company, which conveyed the land by warranty deed to those under whom it claims title, such deed containing the following reservation and exception:

"Saving and reserving to the grantor herein, its successors and assigns, forever, all mines and ores of metals that are now or may be hereafter found on the said lands, with the right to enter upon the same, and use and occupy all lands necessary for mining purposes, to lay down railroad tracks, and build roads and railroads, over and across the same, and to mine and carry away the mineral thereon."

The complainant alleges that defendant claims under the reservation of the deed. The bill also states that complainant and its grantors has been in the actual use and possession of the land, continuously and uninterruptedly, since the year 1867. The bill further states that defendant sets up and claims title to the marble and serpentine in the said land, and refuses to commence an action at law for the same.

Three questions are raised upon the record—

1. As to the jurisdiction of the court of chancery to grant the relief prayed.
2. As to whether the complainant has any title whatever to the land.
3. As to whether marble and serpentine are embraced in the reservation of the deed under which complainant claims title.

The proofs introduced show conclusively that the Michigan Marble Company, working under an option from defendant, before the filing of the bill of complaint, entered upon the land, erected a toolhouse or blacksmith shop, also erected machinery, and began the work of quarrying marble and serpentine, and had removed some of the marble; that its possession was open and notorious; that complainant knew of such possession; that the marble

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company was in possession at the time the bill was filed and afterwards. These facts being established by complainant's witnesses, and undisputed, there appears to be no reason why the Deer Lake Company should not have proceeded at law to try its title to the land. When such remedy at law exists, equity has no jurisdiction over the controversy. This has been repeatedly held by this Court. *Blackwood v. Van Vleet,* 11 Mich. 252; *Tabor v. Cook,* 15 Id. 324; *Moran v. Palmer,* 13 Id. 368. As this must dispose of the present suit, it would be improper to express any opinion upon the other questions presented.

The decree must be reversed, and bill dismissed, with costs of both courts.

CAHILL, LONG, and GRANT, JJ., concurred. MORSE, J., did not sit.

ALLAN CALDWELL, TREASURER OF THE TOWNSHIP OF OLIVER, v. DAVID WARD AND HENRY C. WARD.

Taxes—Removal of timber—Waste—Injunction.

1. Act No. 223, Laws of 1889, as introduced, was entitled "A bill authorizing and empowering the township treasurers of the county of Kalkaska, in the State of Michigan, to force the collection of taxes in certain cases," while the title to a substitute reported after the first fifty days of the session was "A bill to authorize the issuance of injunctions to restrain waste upon certain lands when the taxes upon the same shall be due and unpaid." And it is held that the titles relate to the same subject-matter, and that, in the absence of the original bill, it will be presumed that its provisions were germane to the object expressed in its title; that the sole object in restraining waste is "to *force* the collection of the taxes;" and that the right to

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enlarge or limit the territory within which such acts shall be operative under bills which, as introduced, include a part or all of the State, has never been questioned, and that this can be done as well after the fifty-day limit as before.

2. Act No. 223, Laws of 1889, authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—The purpose of the statute is to prevent the removal of timber without the payment of the taxes assessed on the lands, and thus to secure to the State the revenue which is justly due from the owners if the tax is legal.

b—The statute does not require that the bill shall allege and the complainant prove that the land would be *worthless* without the timber, or would not be worth the amount of the tax.

c—The statute applies only to *wild* lands, and makes the cutting of timber on lands *chiefly* valuable for their timber waste, and the clear intent of the Legislature was to force the payment of the taxes before the land is stripped of its *chief* value.

d—The township treasurer is made the agent of the State during his term of office to commence suit whenever the occasion arises, which cannot be done while the tax roll is in his hands, nor until the expiration of the time specified by law for payment of the taxes.

Appeal from Kalkaska. (Aldrich, J.) Argued October 21, 1890. Decided October 31, 1890.

Bill to restrain waste upon lands upon which taxes are unpaid, under Act No. 223, Laws of 1889. Complainant appeals from a decree dismissing bill. Decree reversed, and cause remanded for further proceedings. The facts are stated in the opinion.

Chauncey C. Jencks, for complainant.

H. H. Wheeler, *H. T. Cook*, *W. D. Totten*, and *C. M. Phelps*, for defendants.

GRANT, J. Act No. 223, Laws of 1889, provides that:

"When any person, company, or corporation shall neglect or refuse to pay any tax assessed on the lands of

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such person, company, or corporation within the time specified by law, the township treasurer shall be entitled to an injunction to restrain waste on any of such lands upon which the taxes shall remain unpaid, when it shall appear that such lands are chiefly valuable for the timber being, standing, or growing thereon."

The act further provides that the circuit judge or circuit court commissioner may upon application grant the restraining order.

Complainant filed the bill in this cause under this law. The bill contains the following allegations:

1. That complainant is the treasurer of the township of Oliver, in Kalkaska county, duly elected and qualified; that he received the tax roll of the township, and took all the steps required by law to secure the collection and payment of the taxes.

2. That there were assessed upon said tax roll taxes upon certain lands of the defendant David Ward, which said lands are particularly described in said bill as they are upon said tax roll described,

3. That the said David Ward is not a resident of the said county of Kalkaska, and that he has no place of business in the said township of Oliver.

4. That the said David Ward has neglected and refused to pay the taxes so as aforesaid assessed to him in said township of Oliver, and appearing on said tax roll.

5. That the said David Ward has no personal property in the county of Kalkaska from which the amount of said taxes could be collected.

6. That the said lands upon which said taxes are assessed are chiefly valuable for the timber standing, being, and growing thereon.

7. That the said David Ward threatens to cut and remove the said timber, and was at the time of the filing of said bill engaged in so cutting and removing the same, and in committing other waste on the said lands, to the great and irreparable injury thereof.

8. That one Henry C. Ward threatens to cut and remove timber from said lands, and at the time of the filing of said bill of complaint was then engaged with numerous men and teams in so cutting and removing said timber, and in committing other waste on said lands, to the great and irreparable injury thereof.

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The bill contains the requisite prayer for relief. Defendants demurred generally. The demurrer was sustained, and complainant appeals.

A general demurrer admits the facts stated in the bill to be true, but denies that they make a case for the interposition of a court of equity. All technical objections are waived. The only question therefore is, does the bill state a case which, if true, entitles complainant to the relief sought?

The proceeding is purely statutory, and, in construing the statute, we must consider the occasion for its enactment, and the object to be accomplished. It has long been notorious in this State that owners of lands valuable mainly, if not entirely, for the timber upon them, remove their timber without payment of the taxes, and pay no taxes thereafter. Such lands are usually sold and bid in at the tax sales by the State. The purpose of this statute is evident, viz., to prevent the removal of the timber without the payment of the tax, and thus secure to the State the revenue which is justly due from such owners if the tax is legal. If, as defendants contend, such a bill should allege that the land would be worthless without the timber, or would not be worth the amount of the tax, and that such allegation must be proven, it is apparent that the remedy would be worthless. The statute clearly does not contemplate such an issue. It is doubtful if a case could be found in which there would not be witnesses to testify that the land when stripped of the timber would be worth the amount of the tax. In the unseemly effort to avoid taxation, unscrupulous methods are often resorted to, and under defendants' contention the law would be practically nugatory.

Whatever meaning may have been given to the term "waste" as applied to heirs, or those in reversion or remainder, or as between mortgagor and mortgagee, it is

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apparent that this statute furnishes its own definition. It applies only to wild lands. It makes the cutting of timber on lands chiefly valuable for the timber waste. In lumbering operations, all available timber is cut. The land is stripped of its chief value. The clear intent of the Legislature was to force the payment before this is done.

The township treasurer is made the agent of the State during his term of office to commence suit whenever the occasion arises. He could not well bring the suit while the tax roll is in his hands, because the tax-payer is entitled to all that time within which to pay. There might be a refusal, but there could not well be a neglect, to pay within the time limited for payment. By the very terms of the act, no suit can be brought until the expiration of the time specified by law for payment. This disposes of all the questions raised as to the frame and character of the bill.

It is insisted that the act is null and void because it was not properly passed by the Legislature, for the alleged reason that it was not introduced within the first 50 days of the session.[1] The history of this legislation is as follows: February 20, 1889, a bill was introduced in the House entitled—

"A bill authorizing and empowering the township treasurers of the county of Kalkaska, in the State of Michigan, to force the collection of taxes in certain cases."

The bill was laid on the table. April 17 the bill was taken from the table, and referred to the committee on judiciary. May 17 the committee reported a substitute for the bill, with the following title:

"A bill to authorize the issuance of injunctions to

[1] See Const. § 28, Art. 4.

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restrain waste upon certain lands when the taxes upon the same shall be due and unpaid,"—

Which is the title to the act as passed. The first bill was introduced before the expiration of the 50 days; the substitute, after. The bill was subsequently duly passed by both branches of the Legislature, and was signed by the Governor. The titles to the original bill and the substitute relate to the same subject-matter, viz., the collection of taxes, and have the same object in view, viz., the enforcement of such collection. The body of the original bill is not before us, and we must presume that its provisions were germane to the object expressed in the title. The sole object in restraining waste is "to force the collection of the taxes." The right to enlarge or limit the territory within which such acts shall be operative under bills which, as introduced, include a part or all of the State, has never been questioned. It can as well be done after the 50-day limit as before. When done, the title must be amended to correspond with the object of the bill. This case is not ruled by *Sackrider v. Supervisors,* 79 Mich. 59 (44 N. W. Rep. 165), but is ruled by *Attorney General v. Rice,* 64 Id. 385 (31 N. W. Rep. 203), and *People v. McElroy,* 72 Id. 446 (40 N. W. Rep. 750).

The decree must be reversed, with costs, and the case remanded for further proceedings.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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CATHERINE S. ARNOLD v. GEORGE W. WHITCOMB AND GEORGE W. WAITE.

Deed—Mental competency of grantor.

No *legal* question is involved in this controversy, the question being one purely of fact, namely, whether the complainant was competent to execute the deed she seeks to set aside, which question is answered in the affirmative.

Appeal from Branch. (Loveridge, J.) Argued October 21, 1890. Decided October 31, 1890.

Bill to set aside a deed executed by complainant to defendant Whitcomb, and a mortgage from him to his co-defendant, on the ground of the incompetency of the grantor, etc. Complainant, and defendant Whitcomb, appeal from decree setting aside the deed, but holding the mortgage a valid security. Reversed, and decree entered holding deed valid, but subject to a life-estate in the complainant, to which the mortgage is subject. The facts are stated in the opinion.

John B. Shipman, for complainant, contended:

1. Under the circumstances, and considering the relation between the parties, it was incumbent upon the defendants to show the fairness of the transaction, and that the deed was the intelligent act of the complainant, before asking the court to sanction it. This Court has repeatedly set aside instruments obtained by fairer means than the one in question; citing *Seeley v. Price*, 14 Mich. 541; *Case v. Case*, 26 Id. 484; *Wartemberg v. Spiegel*, 31 Id. 400; *Berry v. Whitney*, 40 Id. 65; *Curtis v. Brownell*, 42 Id. 165; *Thorn v. Thorn*, 51 Id. 167; *Crawford v. Hoeft*, 58 Id. 1; *McDaniel v. McCoy*, 68 Id. 332; *Crips v. Towsley*, 73 Id. 395.
2. When a deed has been obtained under such circumstances, there

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is no such thing as a *bona fide* mortgagee. The deed is not only voidable, but void, as against third persons, as well as against the grantee; citing *Hannahs v. Sheldon*, 20 Mich. 278; *Rogers v. Blackwell*, 49 Id. 192; *Curtis v. Brownell*, 42 Id. 165; *McGinn v. Tobey*, 62 Id. 252.

3. Whether defendant Waite was an innocent mortgagee is not in issue. He does not make that claim in his answer. The rule laid down in the books is that the facts constituting a person a *bona fide* mortgagee must be set up in the answer before evidence can be given of them, although notice of defects in his title is not charged; citing *Frost v. Beekman*, 1 Johns. Ch. 302; *Denning v. Smith*, 3 Id. 345; *Boone v. Chiles*, 10 Pet. 177; *Thomas v. Stone*, Walk. Ch. 117.

Milo D. Campbell and *Clayton C. Johnson*, for defendant Whitcomb, contended:

1. The evidence of mistake (if such be claimed) should be so clear as to establish that fact beyond cavil, and especially as the papers were prepared by complainant's own adviser: citing *Case v. Peters*, 20 Mich. 303; *Vary v. Shea*, 36 Id. 388; *Reynolds v. Campbell*, 45 Id. 529.

2. The testimony of complainant, though uncontradicted, would not be sufficient to set aside her deed; citing *Kent v. Lasley*, 24 Wis. 654; *McClellan v. Sanford*, 26 Id. 595; *Harter v. Christoph*, 32 Id. 245.

3. A deed should not be set aside, though made by a very aged person, where good reasons are given for making it, though under guardianship when the application is made; citing *Sikes v. Crissman*, 35 Mich. 96.

4. The incompetency alleged must have existed at the very time the papers were made, and proof of its existence some time before or after the execution will not avail; citing *Brown v. Brown*, 39 Mich. 792; and the burden of proof is on the complainant; citing *Brown v. Brown*, 39 Mich. 792; *Gibbons v. Dunn*, 46 Id. 146; *Harris v. Smith*, 40 Id. 453; and the fact that they are executed in harmony with intentions long entertained by the grantor is entitled to great weight; citing *Campbell v. Campbell*, 75 Mich. 53.

5. Instruments not properly acknowledged are good between the parties; citing *Taylor v. Youngs*, 48 Mich. 268; *Brown v. McCormick*, 28 Id. 215; How. Stat. §§ 5713, 5724.

Charles N. Legg, for defendant Waite, contended:

1. When the court is called upon to postpone a legal mortgage,

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its powers are invoked to take away a legal right, and I can see no ground which can justify such action except fraud, or gross and willful negligence, which, in the eyes of the court, amounts to fraud; citing 1 Jones, Mort. §§ 592, 625; *Fraser v. Passage*, 63 Mich. 551; *Iron Works v. Bresnahan*, 66 Id. 500.

2. If it is found that the title of Whitcomb was acquired through fraud, still his mortgage to an innocent mortgagee for value will be protected, and he held to account for the money realized thereon; citing *Cheney v. Gleason*, 117 Mass. 557; *Austin v. Dean*, 40 Mich. 386; *McGinn v. Tobey*, 62 Id. 252.

GRANT, J. The complainant is a widow, and was about 84 years old at the time the bill was filed. Her husband's estate had been divided between herself and their children. The land here in dispute was assigned to her. She was the owner in fee-simple.

The defendant Whitcomb is her grandson, and at the time of the transaction referred to in the bill of complaint was about 20 years old. His mother became insane when he was a child, and has ever since been confined in an asylum. The complainant took him to live with her, brought him up, and, except one short absence, he lived with her till the commencement of this suit. In the spring of 1888 he was about to go to Dakota, where he had been a portion of the previous year. About this time she was taken sick, and at her solicitation he remained at home. On April 30, 1888, she executed to him a warranty deed of the land in question. He at the same time signed and delivered to her a life-lease of the premises, which gave her the absolute possession, control, use, and all the rents and profits of the land. She soon recovered from her sickness, and they continued to live together until he was married, in the fall of 1888. After the marriage they still lived together for a while, but finally she lived by herself in one part of the house and he and his wife in the other. The deed was properly

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executed and recorded. The lease was not acknowledged by him, but was delivered.

February 27, 1889, she, by her solicitor, filed this bill, praying that the deed might be set aside, and alleging that, according to her recollection, it was not read to her, and if it was, being deaf, that she did not understand it; that she did not know what kind of a paper she signed, nor what its purport was, but that she was told that she could revoke it, set it aside, and take possession of the property at any time she saw fit; and that she was incompetent at the time either to make any such agreement, or to sign such paper, or to enter into any business transaction, and did not then know what she had done.

Defendant Waite was a mortgagee of the defendant Whitcomb, the mortgage being for $300, and executed subsequent to the deed. Proofs were taken and decree rendered for complainant. The circuit judge filed a written opinion, in which he says that the mind of complainant, for a person of her age, is vigorous and strong; that she realized that she was making a conveyance, but supposed it was of such a nature that she could at any time recall it; that her mind was weakened and impaired by her long and severe illness, and that she did not fully understand and comprehend the effect of the business she was transacting.

There is no evidence in the case of undue influence, deception, or fraud. No legal question is involved in the controversy. The question is one purely of fact, namely, was she competent to execute the deed? We cannot concur with the learned circuit judge in the conclusion reached by him. The examination of complainant, which was very long and rigid, shows that she is possessed of unusual mental vigor for one of her age. It furthermore

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shows that the arrangement, as she understood it, was practically carried out by the deed and the lease. Outside of the interested witnesses, her own sons and daughters, the testimony is too weak to be of any value. The disinterested witnesses on her part do not testify to any impairment of mind, but only to weakness caused by severe sickness. It fails to make out a case of incompetency. Even the interested witnesses do not testify to facts which show incompetency, and, without such facts to enlighten the court, opinions should receive little consideration. But even their opinions are so colored by prejudice, feeling, and interest, that they are practically valueless. The testimony of her agent who drew the papers, of the physician who attended her, of the justice who took the acknowledgment, and several other neighbors and acquaintances, shows that she was competent to execute the deed; that she thoroughly understood the transaction; and that the deed was read over to her by Mr. Beers, who drew it, and explained to her her rights under the lease. It is apparent that the interference of others, prompted by selfishness, was the cause of the trouble between complainant and her grandson. It would be profitless to enter into the details of this transaction, and the quarrels between this family, contained in a record of 250 pages.

There is no evidence that the neglect to have the lease acknowledged was anything but an oversight. After this suit was brought, defendant Whitcomb, who always recognized its validity, tendered complainant a lease properly executed and acknowledged. We hold the deed valid, subject to a life-estate in complainant. Defendant Waite took his mortgage with full knowledge of complainant's rights. It is therefore subject to her life-estate. This was the decree of the court below, and it is correct.

Decree of the court below reversed, and decree entered

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here in accordance with this opinion. Under the circumstances, no costs will be allowed.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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JOSEPH HANAW v. DAVID R. BAILEY.

Landlord and tenant—Lease—Forfeiture—Summary proceedings—Appeal—Affidavit—Bond.

1. After a defendant had taken an appeal from a judgment of restitution in a summary proceeding to recover possession of lands, he served a notice upon the complainant that he would quit the premises on a certain date, and requested him to divide the property on the leased premises, and subsequently left the land. And it is held that he did not thereby satisfy the judgment appealed from, or admit that he was holding possession unlawfully when the suit was commenced, but that such surrender was an act entirely independent of the judgment and prior proceedings.
2. An affidavit in the form commonly used on appeal from justices' courts, which alleges that a judgment has been rendered against the appellant whereby he is required to leave and deliver up possession of a farm to the appellee, is sufficient on an appeal from a judgment of restitution rendered in a summary proceeding under the statute to recover the possession of the farm.
3. How. Stat. § 8307, providing for an appeal from judgments in summary proceedings to recover the possession of lands, does not, in express terms, provide that the commissioner shall indorse on the bond either that he has fixed the penalty or approved the bond; and when a bond is accepted in a certain penalty, and an appeal granted by making a return of the proceedings had before the commissioner, with the affidavit and bond on such appeal, it will be presumed in favor of the jurisdiction of the appellate court that the commissioner not only approved the bond, but fixed its penalty according to law.

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4. A farm lease provided for the working of the farm in a good and workman-like manner, and, in case of a failure so to do, reserved to the lessor the right to perform the work, and deduct the cost from the lessee's share of the crops, who was given full possession of the house on the farm during *his* tenancy, without compensation therefor. The forfeiture and re-entry clauses were stricken from the printed blank used in preparing the lease. And it is held that the right of the tenant to remain in possession of the farm during the term of the lease did not depend upon the manner of his performance of the agreement as to working the same, and that non-performance of this agreement would not forfeit the lease.

Error to Jackson. (Peck, J.) Submitted on briefs October 22, 1890. Decided October 31, 1890.

Summary proceedings to recover possession of land. Complainant brings error. Affirmed. The facts are stated in the opinion.

A. E. Hewitt (*Austin Blair*, of counsel), for appellant.

Dwight D. Root, for defendant.

[The points of counsel are stated in the opinion. —REPORTER.]

MORSE, J. This is a summary proceeding instituted before a circuit court commissioner of Jackson county to recover possession of lands held by defendant under a contract for working the same. The commissioner after trial of the issue before him gave judgment of restitution in favor of the complainant, and for costs, amounting to $34.10. This judgment was rendered March 26, 1889.

On the 29th of same month, defendant presented an affidavit and bond for appeal, and paid the costs and entry and return fee required on such appeal. In the circuit court complainant made a motion to dismiss the appeal, which was denied. Afterwards, when the cause came on to be tried, and after a jury was impaneled and

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sworn, but before proceeding to trial, the complainant objected to the appellant's proceeding to the trial on the ground that the appeal was not legally taken, and the court therefore had acquired no jurisdiction to try the case, assigning the same reasons as in his motion to dismiss. The objection was overruled. Thereupon, for the purpose of saving time on the trial, and the examination of a large number of witnesses, at the suggestion of complainant's attorneys, it was consented to by the attorneys for the respective parties that the complainant might offer in evidence the lease or agreement of the parties under which the defendant had possession of the premises in controversy, and for violation of which the complaint was made, and the defendant might thereupon at once raise the question whether, under this lease, the complainant could recover possession of the farm under the statute, the re-entry clause having been struck out by the parties, and the term not having expired. The complainant's attorneys thereupon stated that they desired and offered to put in testimony tending to show that the defendant had violated the agreements contained in the lease in all material particulars; he had not carried on the farm in a husband-like manner, and had produced substantially no crops, and did not take care of the stock as he had agreed to do. It was admitted that these proceedings were commenced a few days before the expiration of the first year, the term being two years. After hearing arguments of counsel for the respective parties upon this question, the circuit judge did then and there state and deliver his opinion that the complainant could not recover in this action by showing that the defendant failed to work the farm in a good and husband-like manner, and so failed to produce crops that the farm ought to have produced, because the contract does not provide for a forfeiture of the tenancy for that reason, and does

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not provide for a re-entry on the premises in case that should occur.

The motion to dismiss the appeal was grounded upon two reasons:

1. That the defendant had surrendered the land to the complainant after the appeal was taken.
2. Because the affidavit and bond for the appeal of said cause were not sufficient to confer jurisdiction on the court.

The first reason was not a good one. It appears that, after the appeal had been taken, or attempted to be taken, and on March 30, 1889, the defendant served a notice upon the complainant, to the effect that he should quit the place on April 1 or 2, 1889, and asking him to come and divide the property on the farm, and he subsequently left the land. This did not affect the appeal. The question to be determined by the appeal related to the forfeiture of defendant's contract, and his right to possession at the time the suit was commenced, and not afterwards. It is contended by complainant's counsel that this giving up of possession was a satisfaction of the judgment of restitution, and there was then nothing left to appeal from. This contention will not hold in such a case as this. The abandonment of the farm by the defendant cannot be considered as an act in satisfaction of the judgment, or an admission that he was at the commencement of suit holding possession of the land unlawfully. It was a transaction entirely independent of the judgment and prior proceedings in this case.

It is claimed under the second objection to the appeal that the affidavit was defective in not stating the nature of the action, nor when it arose, nor when it was tried. The affidavit for appeal was in the common form of affidavits on appeal from justices' courts, and was sufficient. How. Stat. § 8307. It reads as follows:

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"STATE OF MICHIGAN, } ss.
"County of Jackson, }

"David R. Bailey, of said county, being duly sworn, says that a final judgment was rendered upon an issue of fact and law, joined between the parties, by E. D. Teele, circuit court commissioner in and for said county, on the 26th day of March, A. D. 1889, in favor of Joseph Hanaw, as complainant, and against deponent, David R. Bailey, as defendant, whereby said Bailey is required to leave and deliver up possession of a farm to said Hanaw, and for thirty-four and 10-100 dollars costs of suit. Deponent further says that such judgment is not in accordance with the just rights of said deponent, as deponent verily believes, and that said deponent conceives himself aggrieved thereby, and appeals therefrom to the circuit court for the county of Jackson, and further deponent saith not.

"DAVID R. BAILEY.

"Sworn to and subscribed before me this 28th day of March, 1889.

"E. D. TEELE,
"Circuit Court Commissioner."

The bond is also said to be defective because it does not appear therein that the penalty was fixed by the commissioner in double the amount of the annual rent of the premises, or that it was approved by the commissioner. The bond is in a penalty of $600, and is in proper form. A certificate is attached by the commissioner that the sureties justified their pecuniary responsibility upon oath before him. No approval is indorsed upon it, yet the commissioner received it, filed it, and returned it with the appeal papers to the circuit court. In the absence of any showing to the contrary, this is a sufficient showing that he approved it. The statute does not, in express terms, provide that the commissioner shall indorse on the bond either that he fixed the penalty or approved the bond, and when, as in this case, he takes a bond containing a certain penalty, and grants an appeal by making a return to the circuit court of the proceedings had before him, with the affidavit and bond of appeal, it will be presumed in favor of the jurisdiction of the circuit court

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that he not only approved the bond, but fixed the penalty of the same in accordance with law.

There was no showing before the circuit court that the penalty of the bond was insufficient, or that the sureties were not good for the amount of the same, nor that the commissioner did not fix the penalty of the same. Furthermore, it was stated in the circuit court by defendant's attorney, and not denied by complainant's counsel, that the commissioner first decided that the bond should be in the sum of $300, but complainant's attorneys insisted that the bond should be raised to $600, whereupon it was so ordered by the commissioner; and that complainant's attorneys then declared themselves satisfied with the sureties as well as the penalty of the bond. This also appears by an affidavit of the commissioner, filed in rebuttal of the motion to dismiss the appeal.

We have now to consider whether the court was right in directing a verdict for the defendant upon the lease or agreement, and the offer of testimony made by complainant. The agreement was made on March 15, 1888, for the term of two years from April 1, 1888, and provided for a longer term of letting year by year if both parties "were satisfied with each other." The letting was on shares, the tools, implements, and teams to be furnished by Bailey,—

"Said farm to be farmed and worked in a good and workman-like manner, and all work to be done seasonable, and under the advice of said party of the first part [Hanaw], who, together with the members of his family, shall be privileged to go upon said farm at any and all times, but not to impede or hinder the work."

Each party was to furnish one-half the seed, etc., and to furnish and own one-half of the stock on the farm. The products of the farm and the increase of stock were to be equally divided. It was further provided in another part of the agreement as follows:

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"The party of the first part reserves the right to say what fields on said farm shall be put into crops, and what kinds of crops shall be put in, but in no event shall said farm be sowed or planted to any one crop disproportionate to the size of said farm, and the amount of stock kept on said farm. The work in carrying on said farm shall be done by the said party of the second part in a good and husband-like manner, and in due season, and, should he fail to do it, then said first party reserves the right to do it, or cause it to be done, and the cost thereof to be deducted from the share of the products of said farm going to said second party, according to the terms of this lease."

It was also agreed that Bailey should have "full possession of the house on said farm during his tenancy, without compensation therefor." The following clause, among others, in the printed blank upon which the agreement was written, was stricken out and erased:

"Provided, that in case any rent shall be due and unpaid, or if default shall be made in any way of the covenants herein contained, then it shall be lawful for the said part—of the first part,—certain attorney, heirs, representatives, or assigns, to re-enter into and repossess the said premises, and the said part—of the second part, and each and every other occupant, to remove and put out."

It would seem, as held by the circuit judge, that the striking out of this clause, with the insertion of the clause permitting and authorizing the complainant to go on and perform the work as it ought to be done, and charge the cost of the same to Bailey, indicates an intent of the parties to the agreement that Bailey's right to remain upon the premises should not depend upon the manner of his performance of the farm work thereon. We are satisfied that this is the proper construction of the agreement. There was in this instrument no right of re-entry reserved upon failure to perform the covenants or conditions of the agreement, nor any stipulation therein

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that a failure to perform should operate as a forfeiture or termination of the lease. *Pickard v. Kleis*, 56 Mich. 604, 609 (23 N. W. Rep. 329); *Hilsendegen v. Scheich*, 55 Id. 468 (21 N. W. Rep. 894); *Langley v. Ross*, Id. 163 (20 N. W. Rep. 886).

The judgment is affirmed, with costs.

The other Justices concurred.

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THE TOLEDO, SAGINAW & MACKINAW RAILROAD COMPANY v. DANIEL J. CAMPAU ET AL.

Railroad companies—Condemnation proceedings—Special questions to jury.

There is no provision in the statutes relative to condemnation proceedings authorizing the submission of special questions to the jury.

Appeal from Saginaw. (Gage, J.) Argued October 22, 1890. Decided October 31, 1890.

Railroad condemnation proceedings. Respondents appeal from an award of $200. Affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for respondents.

Hanchett, Stark & Hanchett, for petitioner.

MORSE, J. The petition in this case was presented by the railroad company for the purpose of acquiring title to certain lands in the city of Saginaw. The respondents answered said petition, and jointly and severally denied that the petitioner had made a map and survey of said

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railroad through said parcels of land, and filed the same in the office of the register of deeds for Saginaw county; and alleged that the paper referred to in said petition as a map and survey of said "Wright Spur," so called, is indefinite and incomplete; that it is impossible for these respondents, or any of them, from an inspection thereof or from said petition, to determine the exact lands that said petitioner is seeking by these proceedings to acquire. They therefore deny the right of the petitioner to institute proceedings herein to acquire their or either of their interests in and to said several parcels of land, for the reasons hereinbefore stated.

The respondents' counsel submitted the following special questions:

"1. Is the taking of the property described in the petition under consideration necessary to be taken by the petitioner for public use?

"2. From the map and survey on file in the office of the register of deeds for the county of Saginaw, shown you, can you identify the property sought to be acquired by the petitioner without reference to other maps, or information furnished you?

"3. From your view of the premises sought to be taken by the petitioner, could you, when upon the ground, determine the location of the lot lines, or the particular property sought to be taken?

"4. Is not the real purpose of the petitioner in obtaining the property under consideration for private instead of public use?"

Proofs were taken, and the jury viewed the premises, as they return in their finding, and they found and determined that it was necessary to take said real estate for public use, stating the use, and awarded damages of $200 to each of the respondents. The jury did not answer the special questions so submitted to them.

The failure to answer such questions is the only error assigned against the validity of the proceedings. There is

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no provision in the statutes relative to condemnation proceedings authorizing the submission of special questions. The law intends that the proceedings shall be as simple as possible. The duty of the jury is justly and impartially to ascertain and determine the necessity for taking the property proposed to be taken for the public use specified in the petition. Their finding in this respect is a general one, and there is no necessity for any special finding or verdict. If they determine the necessity, then they find the damages which ought justly to be awarded to each land-owner. They have then performed their whole duty under the law.

The proceedings are affirmed, with costs.

The other Justices concurred.

THE TOLEDO, SAGINAW & MACKINAW RAILROAD COMPANY v. MILLIE H. CAMPAU ET AL.

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[See *ante*, 31.]

Railroad companies—Condemnation proceedings—Special questions to commissioners—Sufficiency of map.

1. It was held in *Railroad Co. v. Campau*, *ante*, 31, that there is no authority in the law for submitting special questions to a jury in condemnation proceedings, and the same rule applies to commissioners.
2. The question whether the map and survey required to be filed to designate the route of a railroad is sufficient for the identification of the property sought to be acquired by condemnation proceedings, without the aid of other maps or information, is a jurisdictional one, to be determined by the court on the

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application for the appointment of commissioners. *Railroad Co. v. Fowler*, 73 Mich. 217.

Appeal from Saginaw. (Gage, J.) Argued October 22, 1890. Decided October 31, 1890.

Railroad condemnation proceedings. Respondents appeal from the award of the commissioners. Affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for respondents.

Hanchett, Stark & Hanchett, for petitioner.

MORSE, J. Upon the petition in this case, three commissioners were appointed to pass upon the questions of necessity and damages. Four special questions were submitted to them by respondents' counsel, which were answered as follows:

"1. Is the taking of the property described in the petition under consideration necessary to be taken by the petitioner for public use?

"*A.* Yes.

"2. From the map and survey on file in the office of the register of deeds for the county of Saginaw, shown you, can you identify the property sought to be acquired by the petitioner without reference to other maps, or information furnished you?

"*A.* No.

"3. From your view of the premises sought to be taken by the petitioner, could you, when upon the ground, determine the location of the lot lines, or the particular property sought to be taken?

"*A.* We could determine the particular property sought to be taken.

"4. Is not the real purpose of the petitioner in obtaining the property under consideration for private instead of public use?

"*A.* No.

We held in the case of *Toledo, etc., R. R. Co. v.*

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Campau, ante, 31, that there was no authority in the law for submitting special questions to the jury. The same ruling applies to commissioners.

But it is claimed that, inasmuch as the special questions were submitted and answered, such findings must be considered; that the jury found that the map and survey, which the statute provides must be filed to designate the route of the railroad, were insufficient, in that the property sought to be acquired by the petitioner could not be identified therefrom without the aid of other maps or information. It is submitted that the entire proceedings are void for this reason. It was not a proper question, however, to be determined by the commissioners, and their finding cannot be used here to show the map to have been insufficient. *Manistee, etc., R. R. Co. v. Fowler,* 73 Mich. 217 (41 N. W Rep. 261). The proper place to raise this question was before the court, on the application to appoint commissioners, as it was a jurisdictional question. It was so raised before him, and he, by appointing the commissioners, determined that the map and survey complied with the statute. No copy of the map is returned with the record to this Court, and we are therefore unable to review the decision of the circuit judge.

The proceedings must be affirmed, with costs.

The other Justices concurred.

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JOSEPH M. LAZELL v. CHRISTIAN F. KAPP.

Negligent driving—Submission of question to jury.

This case is ruled by *Boick v. Bissell*, 80 Mich. 260, and the question of the negligence of plaintiff and of defendant was properly submitted to the jury.

Error to Washtenaw. (Kinne, J.) Argued October 22 and 23, 1890. Decided October 31, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Charles R. Whitman, for appellant, contended:

1. One cannot recover for an injury caused by another's negligence if his own want of ordinary care contributed thereto; citing *Railroad Co. v. Leahey*, 10 Mich. 193; *Railroad Co. v. Miller*, 25 Id. 274; *Daniels v. Clegg*, 28 Id. 32; *Mabley v. Kittleberger*, 37 Id. 360; *LeBaron v. Joslin*, 41 Id. 313; *Straugh v. Railroad Co.*, 65 Id. 706; *Mynning v. Railroad Co.*, 64 Id. 93; *Matta v. Railway Co.*, 69 Id. 109; *Kwiotkowski v. Railway Co.*, 70 Id. 549.

A. F. Freeman (*A. J. Sawyer*, of counsel), for plaintiff, contended:

1. If the circumstances out of which the injury or act complained of occurred tend to show ordinary care, the question is for the jury, and it must be a very extraordinary case that will justify the court in taking it from them; citing *Carver v. Plank-road Co.*, 69 Mich. 620; *Billings v. Breinig*, 45 Id. 65; *Teipel v. Hilsendegen*, 44 Id. 462; *Hassenyer v. Railroad Co.*, 48 Id. 207; *Swoboda v. Ward*, 40 Id. 424; *Railroad Co. v. Van Steinburg*, 17 Id. 120; *Boick v. Bissell*, 80 Id. 260.

MORSE, J. The plaintiff sued defendant in the circuit court for the county of Washtenaw for personal injuries received in a public street, in the village of Manchester. The questions as to the negligence of the defendant, and the contributory negligence of plaintiff, were submitted

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to the jury, who returned a verdict in favor of the plaintiff in the sum of $300.

The only error insisted upon in this Court is the submission of the question of the plaintiff's negligence to the jury. It is contended that the court below should have directed a verdict for the defendant upon the plaintiff's own showing.

The plaintiff's case was substantially as follows: The plaintiff lives upon the north side of Jefferson street, the main traveled street in the village. The street where the injury happened is wrought perfectly smooth for vehicles from sidewalk to sidewalk. The street is four rods wide. A space of about five feet is used on each side for sidewalks, and grass grows along the sides of the street something like from 10 to 15 feet in width into the street. Among other things the plaintiff is a dealer in wood. On the morning of November 13, 1888, as he was coming out of his lot into the street, he saw a farmer, one William Campbell, drive up in front of the residence of Mrs. Graham, with a load of wood. Mrs. Graham lived across the street from plaintiff, and one lot to the west, the lots being four rods wide. Plaintiff called out to Campbell to know if he could buy the wood. Campbell replied that he had sold it to Mrs. Graham, but went into her house to see if she would let him sell it to plaintiff. When he came out he informed plaintiff that he might have it. Plaintiff then started diagonally across the street in the direction of Campbell, and Campbell at the same time went in the direction of the plaintiff. They met in the street on the south side, about a foot or two from the edge of the grass. Plaintiff wanted the wood for Miss Marvin, who lived on the south side of the street. Her place was one lot east of plaintiff's. As the parties met Campbell said: "Where will you have this wood?" Plaintiff turned round, raised his arm, and,

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pointing, said: "Do you see that big kettle? Do you see that brick house? Turn in there, and throw it off." As he said this he was struck by the buggy wheel of defendant. The buggy was going east, and was driven by the defendant, and drawn by one horse. The horse was on a sharp trot. As plaintiff was going across the street he saw the defendant coming about 10 rods away. As he turned around to point out Miss Marvin's to Campbell, his back was towards defendant. He did not hear the buggy coming. Campbell testifies that he heard it just in time to get out of the way, or he would have been struck. The wheel struck plaintiff in the side, under the arm, and knocked him over. As he fell he caught the thill with his hand and was dragged nearly 10 feet, until the horse stopped. Campbell testified substantially as plaintiff did, and that the defendant afterwards told him that he was reading a letter when the collision occurred. This the defendant denied, and testified that he saw plaintiff crossing the street when he was far enough ahead of him so that he might have crossed the street half a dozen times before the vehicle would have reached him at the rate it was going. Did not watch him for that reason. He did not see Mr. Campbell at all until after the accident. After noticing plaintiff crossing the street, and before the collision, his attention was attracted by a horse running out of a barn on the lot of one Kingsley, and the first thing he knew after that he "saw a hand grab hold of the thill as I turned back from the object I was looking at." There was also testimony on the part of the defense tending to show that, at the time of the accident, plaintiff and Campbell were standing nearly in the center of the street, a little to the right side, as the defendant was driving.

Defendant's counsel contends that, if the defendant

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was negligent because he permitted his attention to be distracted from plaintiff by the horse escaping from Kingsley's barn, when he had seen plaintiff crossing the street in front of him, then it was certainly negligence in the plaintiff, after he had noticed defendant coming towards him, to turn his back to defendant, and take no heed to his approach; that the obligation to keep a look-out to avoid collision was as great upon one as the other. We think the negligence of each was properly submitted to the jury. This case is ruled by *Boick v. Bissell*, 80 Mich. 260. There were no teams in this street, in the immediate vicinity, on this morning, except Campbell's and defendant's. If plaintiff was standing as he and Campbell testify, within two feet of the grass, leaving a space of 25 or 35 feet between him and the sidewalk on the north side of the street, nearly half of which distance was the usually traveled track, and the balance of it smooth and fit for travel, it was eminently a proper question for a jury to determine whether or not the plaintiff, in turning his back for a moment to the defendant, and for the purpose of pointing out Miss Marvin's place, did what an ordinarily prudent and careful man would have done under the same circumstances, and whether or not he did not have the right to presume that he would be safe from being run into with all this space to the right of him, when the defendant had the horse under control, and was coming down the street in full sight of him.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

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THE GUNN HARDWARE COMPANY v. WILLIAM C. DENISON.

Attachment—Affidavit—Waiver of defects by pleading to merits.

All objections to the process or proceedings by which a defendant is brought into court are waived by him by pleading to the merits.

So *held*, where a suit was commenced by attachment to recover on an open account then due, and also the amount to become due on a note. In addition to the usual affidavit in attachment, one was filed under Act No. 149, Laws of 1889, permitting attachments under certain circumstances before the debt is due; and, after appearing and pleading without objection, the defendant on the trial objected to the introduction of the note in evidence because not due when suit was commenced, and because the special affidavit so filed was insufficient, which objection is held properly overruled for the reasons stated.

Error to superior court of Grand Rapids. (Burlingame, J.) Submitted on briefs October 23, 1890. Decided October 31, 1890.

Attachment suit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Fletcher & Wanty, for appellant, contended:

1. This Court held at the April term, 1890, in the *mandamus* case of *Newman v. Circuit Judge of Kent County* (no opinion being filed), that an affidavit under Act No. 149, Laws of 1889, must state facts on knowledge, and not on information and belief, which facts must be sufficient to sustain a warrant under the fraudulent debtors' act.
2. The affidavit in this case, to authorize an attachment under said statute, must state upon the knowledge of the affiant that the mortgages referred to therein were fraudulent, or that some property of the defendant had been fraudulently concealed, incumbered, or disposed of; citing *Stensrud v. Delamater*, 56 Mich. 146, and cases cited; *Marble v. Curran*, 63 Id. 288.

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3. The writ of attachment could not have been quashed, as it was supported by a sufficient affidavit for the amount due, and, that being true, our only protection as to the amount not due was the objection made to the introduction of that portion of the claim.

Uhl & Crane, for plaintiff, contended:

1. This Court has uniformly held that all objections to process are waived by a plea in bar; citing *Stewart v. Hill*, 1 Mich. 265; *Hart v. Blake*, 31 Id. 278; *Miller v. Rosier*, Id. 475; *Pierce v. Rehfuss*, 35 Id. 53; *Manhard v. Schott*, 37 Id. 234; *Railroad Co. v. Gray*, 38 Id. 461; *Bryant v. Hendee*, 40 Id. 543; *Maxwell v. Deens*, 46 Id. 35; *Clark v. Dunlap*, 50 Id. 492; *Austin v. Burroughs*, 62 Id. 181; *Dailey v. Kennedy*, 64 Id. 208; *Pistorius v. Swarthout*, 67 Id. 186.

CHAMPLIN, C. J. On November 4, 1889, the plaintiff commenced suit against the defendant by attachment. The plaintiff's demand consisted of two items. The first item was the balance then due from defendant to plaintiff upon an open account amounting to $196.23. The second item was a promissory note dated April 26, 1889, payable January 10, 1890, for $316.16. Two affidavits were made as the foundation of the attachment proceedings,—one, in the ordinary form required by section 7987 of Howell's Statutes, stating that $196.23 was then due upon express contract; the other was an affidavit framed under the provisions of Act No. 149, Laws of 1889, permitting attachments under certain circumstances where the indebtedness was not due. This affidavit was indorsed by the judge of the superior court, as required by statute. Afterwards such proceedings were had that the attachment was served and duly returned.

A declaration was filed by the plaintiff, to which the defendant appeared and pleaded the general issue. The cause came on for trial on May 2, 1890, when the note above mentioned was offered in evidence, to the intro-

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duction of which counsel for defendant objected, for the reason that it appeared that the action was commenced on November 4, 1889, and the note was not due until January 10, 1890, and that no sufficient affidavit had been filed by which said action could have been commenced by attachment for the amount represented by said note before such note became due. The objection was overruled, and defendant alleges error.

The ruling was correct. By appearing to the action, and pleading the general issue, the defendant waived all irregularities in the prior proceedings. The court had jurisdiction over the subject-matter and the parties. Insufficiency of an affidavit cannot be taken advantage of upon the trial, in a suit between the parties to the record in which such affidavit was filed. *Wasey v. Mahoney*, 55 Mich. 194 (20 N. W. Rep. 901); *Taylor v. Adams*, 58 Id. 187 (24 N. W. Rep. 864). We have uniformly held that all objections to process or proceedings by which the defendant is brought into court are waived by him by pleading to the merits. The decisions are collected in plaintiff's brief, and need not be cited here. If the defendant wishes to raise the question of the sufficiency of the affidavit, he must do so in some manner known and practiced, before pleading to the merits.

The judgment is affirmed.

The other Justices concurred.

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ELIZABETH F. KEENAN v. JAMES L. CUMMINS.

Appeal—Credibility of witnesses.

This case turned entirely upon the credibility of the witnesses, and mainly upon that of the parties, and, no error appearing in the charge or in the admission of testimony, the judgment is affirmed.

Error to Wayne. (Hosmer, J.) Argued October 24, 1890. Decided October 31, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Stewart & Galloway, for appellant.

D. Newton (*Conely, Maybury & Lucking,* of counsel), for plaintiff.

CHAMPLIN, C. J. This action was brought in justice's court to recover from defendant $50 and interest, which the plaintiff claimed to be owing her by defendant.

The judgments of two courts have passed for plaintiff, and the defendant brings the case here, assigning errors of law committed upon the trial in the circuit court.

The case turned entirely upon the credibility of the witnesses, and mainly upon the credibility of the parties to the suit, who testified in their own behalf. Both parties testified that defendant had the money. The plaintiff claims it was a loan, and an independent transaction from other business matters which she had with defendant. The defendant claims that it was received and was to be applied upon his account for services rendered, and to be rendered, to and for plaintiff in certain divorce proceedings; that it was so applied, a bill rendered therefor in

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which the plaintiff was credited with the $50, and a settlement had which was satisfactory to the parties. On these two theories, testimony was introduced before the jury covering all the transactions between the parties; and the court submitted such testimony to the jury upon these respective theories, and the jury found a verdict in favor of the plaintiff.

We discover no error in the charge or in the admission of testimony, and the judgment is affirmed.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

HIRAM D. WILMARTH, ADMINISTRATOR, ETC., v. ALFRED REED.

Executors and administrators—Possession of real estate—Summary proceedings.

By his will a father devised his real estate to eight of his nine heirs, and bequeathed to the ninth heir his personal property. At the time of the father's death *this* heir was in possession of a portion of the real estate under a lease from his father, which was to terminate at his death. The heir admitted his liability to pay the rent to the administrator, who allowed him to remain in possession upon his executing an agreement authorizing the administrator to withhold from his share of the estate, on final distribution, the rent due and to become due, which share was declared to be security for such rent. Pending an appeal from the disallowance of the will, an order was made by the probate court for the delivery of the real estate to the heirs, from which order the *one* heir appealed for the reason that the personal property was insufficient, as claimed, to pay the debts and expenses of administration, and that it was necessary for the administrator to retain possession of the real estate and apply the rents and profits towards such payment.

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The share of the heir in the personal property, if the will was disallowed, was insufficient to pay the rent, but the rent was not required for the payment of debts and expenses of administration. On the failure of the heir to pay the rent, the administrator instituted summary proceedings to recover possession, and in affirming a judgment in his favor the Court distinguished this case from *Rough v. Womer*, 76 Mich. 381, and hold that the circumstances detailed in the findings (the substance of which are above stated) show that a necessity exists for the administrator to take possession of the real estate for his own protection, whatever may be the outcome of the proceedings to probate the will, for the purpose of collecting the rents and profits with a view to pass them over to the executor if one is appointed, or to a just and fair distribution of the estate if such appointment is not made.

Error to Wayne. (Reilly, J.) Argued October 24, 1890. Decided October 31, 1890.

Summary proceedings to obtain the possession of land. Defendant brings error. Affirmed. The facts are stated in the opinion.

J. J. Speed (*Wisner, Speed & Harvey,* of counsel), for appellant.

Gray & Gray, for plaintiff.

CHAMPLIN, C. J. Complaint was made before a circuit court commissioner for the county of Wayne by Hiram D. Wilmarth, as administrator of the estate of Jesse W. Reed, deceased, against Alfred Reed, to obtain possession of certain real estate. A trial was had before the commissioner, which resulted in a judgment for complainant. Defendant appealed, and the cause was tried before Circuit Judge Hon. C. J. Reilly, who made the following written findings of fact and law, viz:

"I find that the defendant went into possession of the premises known by the street numbers as Nos. 266, 268, 270, 272, 274, and 276 Grand River avenue, and also as lots 7, 8, and 9, Reed's block, being the premises in dispute, under a lease made to him by his

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father, Jesse W. Reed, through his guardian, John C. Goodrich, duly appointed by the probate court of Wayne county, dated October 30, 1886, for five years, to terminate, however, in case the father died before the expiration of the lease; that the father died May 10, 1889; that defendant has continued to occupy said premises by virtue of the possession given under said lease.

"That the complainant in this case was appointed administrator of the estate of Jesse W. Reed, deceased, July 18, 1889; that prior to October 5, 1889, complainant and defendant had several conversations about the rent, at all of which defendant promised to pay the rent to complainant, and never disputed his liability therefor. On October 5, 1889, complainant and defendant had an interview in regard to the rent, and defendant admitted his liability for the rent of the premises to complainant, and executed the following agreement to complainant to secure the payment of rent due and to become due:

"'Whereas, Alfred Reed is occupant of the premises known by the street numbers as Nos. 266, 268, 270, 272, 274, and 276 Grand River avenue, and also known as lots 7, 8, and 9, in Reed's block, under a lease from John C. Goodrich, guardian of Jesse W. Reed; and whereas, he desires to secure the rent due and to become due to Hiram D. Wilmarth, administrator of the estate of Jesse W. Reed, for said premises under said lease:

"'Now it is agreed between said Alfred Reed and said administrator that the said administrator may withhold, on distribution of the estate of said Jesse W. Reed, any rent due or to become due which may then remain unpaid, and the said share is hereby declared to be security for the payment of said rent; and the said Alfred Reed now states that he is the owner of said share as one of the heirs of said Jesse W. Reed. ALFRED REED.

"'In presence of
"'J. J. SPEED,
"'JAY FULLER.

"'Dated Detroit, October 5, 1889.

"'STATE OF MICHIGAN, } ss.
"'County of Wayne, }

"'On this fifth day of October, A. D. 1889, personally appeared Alfred Reed before me, a notary public for said county, known to me to be the same person who subscribed the foregoing instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

"'ANNA R. KENNEDY,
"'Notary Public, Wayne County, Mich.'

"That Jesse W. Reed in his life-time made a will devising his property, and that from the disallowance of the will by the probate court an appeal has been taken to this court, which is still pending; that until the disposition of this appeal it is impossible for the administrator to divide the personal estate, or to determine to whom the real and personal property goes.

"That the complainant, as the administrator, has in his hands belonging to the estate of Jesse W. Reed, father of defendant, be-

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tween $12,000 and $13,000 of personal property over and above the amount needed for the payment of debts and expenses of administration up to the present time, and that the real estate left by said Jesse W. Reed, and remaining to be divided among the heirs, is valued at $55,000; that the share of defendant in the personal estate of his father, Jesse W. Reed, is insufficient security for the payment of the rent of the premises occupied by him; that the amount of the said rent was not required or necessary for the payment of any debts of said Jesse W. Reed, nor for payment of expenses of administration of his estate.

"That Jesse W. Reed left nine heirs at law, of whom the defendant is one; that, by the terms of the instrument offered as the last will and testament of Jesse W. Reed, no part of said premises would pass to defendant, but defendant would take all of the personal estate; that defendant has appealed from an order of the probate court (made since the judgment of the circuit court commissioner) delivering over the real estate of said Jesse W. Reed to the heirs and devisees; that the following is a copy of his claim for appeal:

"'IN THE PROBATE COURT FOR WAYNE COUNTY:

"'*In the Matter of the Estate of Jesse W. Reed, Deceased:*

"'To EDGAR O. DURFEE, ESQ.,

"'Judge of Probate for County of Wayne:

"'Please to take notice that the undersigned, Alfred Reed, one of the heirs at law of the said deceased, being aggrieved by the decree of said judge of probate made on the 25th day of February, A. D. 1890, in the matter of the estate aforesaid, by which the real estate was directed to be delivered over to the heirs and devisees of said deceased, as appears by the record thereto in the office of the judge of probate, hereby claims an appeal therefrom to the circuit court for the county of Wayne, for the following reasons, that is to say:

"'1. That it is necessary that the administrator should retain possession of the real estate, and receive the rents of the same, for the purpose of paying the debts of deceased and expenses of administration.

"'2. Because there is not sufficient personal property to pay the debts and expenses of administration, and it is necessary to appropriate the rents and profits of the real estate, or proceeds of sale of some parts thereof, to the payment of debts and the expenses of administration.

"'3. Because it was improper to make said order until the commissioners on claims had reported.

"'ALFRED REED,

"'By J. J. Speed, his attorney.

"'Dated this 27th day of February, 1890.'

"I find further that at the time proceedings were begun before the circuit court commissioner there was rent past due and unpaid, and none of it has since been paid.

"I find further that written notice to surrender possession in

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default of payment of the rent past due was duly served upon defendant more than seven days before commencement of proceedings before the commissioner, as required by statute, and that all proceedings for the purpose of obtaining possession by complainant of the premises in dispute were regular, and that the rent due from defendant to April 1, 1890, is $960.

"From the foregoing finding of facts, I find as a conclusion of law that the complainant is entitled to a judgment for restitution of the premises."

But one error is assigned, and that is that the findings of fact do not support the judgment, and consequently it ought to have been rendered in favor of the defendant. It will be noticed that by the agreement signed by Alfred Reed, by which he was permitted to continue in the occupation of the premises under the lease, and the administrator might withhold on the distribution of the estate of Jesse W. Reed any rent due or to become due, to be by the administrator applied on the distributive share of Alfred Reed, Alfred Reed only pledges such distributive share as security for the payment of said rent which he may be entitled to as owner, as one of the heirs of said Jesse W. Reed, so that if the will which is now being tested should be admitted to probate Alfred Reed will have no distributive share as heir of the estate. But it is said if such will should be established Alfred Reed would be entitled to all of the personal property, and it is admitted that there is now in the hands of the administrator some $12,000 or $13,000 of such personal property over and above the amount needed for the debts and expenses of administration up to the time the case was tried in the circuit court. There is nothing, however, to prevent Alfred Reed from conveying the legacy given to him by the will to some third party, in which case the administrator would be without any security whatever, and, as the rents inure to the benefit of the heirs of the real estate, the administrator might be held responsi-

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ble to the heirs for his neglect to collect such rents. On the other hand, it is found as a fact that the share of the defendant in the personal estate of his father, Jesse W. Reed, is insufficient security for the payment of the rents of the premises occupied by him.

We held in the case of *Rough v. Womer*, 76 Mich. 381,—

"That, while the executor has the right to the possession, that right is given in contemplation that it may become necessary to exercise it in the settlement of the estate for the purpose of the payment of claims against the estate. Hence it is that the duty of the executor is not made imperative to exercise the right in all cases, but is only permissible when the necessity arises for its exercise, and until such occasion does arise the heir or devisee, who has entered upon the enjoyment of his property and estate, ought not to be and cannot be lawfully disturbed. In other words, the right is given to the executor, and only accompanies the necessity for its exercise."

But it will be noticed that there is a plain distinction between that case and this. In that case, the person in possession claimed under a will which devised the farm, which was the homestead of the deceased, to him. In this case, if the will should stand, the defendant would have no interest whatever in the real estate; and, if it is not admitted to probate as a valid will, then the defendant would be entitled to a distributive share of one-ninth of the real estate as well as of the personal property.

Moreover, the circumstances detailed in the findings show that necessity does exist for the administrator to take possession of the real estate of the deceased for his own protection, whatever may be the outcome of the proceedings to probate the will, and hence, in accordance with the views expressed in the case of *Rough v. Womer*, it would be the duty of the administrator to

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exercise the right which the statute gives him to obtain possession of the property for the purpose of collecting the rents and profits with a view either to pass them over to the executor, if one is appointed, or to a just and fair distribution of the estate if an executor is not appointed.

We think the facts found support the judgment in this case, and it is therefore affirmed.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

WILLIAM T. JOPP v. JULIUS KEGEL AND JOSEPH KEMP.

Justices' courts—Appeal—Joint defendants.

An affidavit for an appeal from a judgment against two joint defendants was made by one of them in behalf of both, who executed the required bond, with one surety, but it was not executed by his co-defendant, nor did he appear in the circuit court; and it is held that the justice's judgment, as to said defendant, remained unaffected by the appeal, and that said defendant was not entitled to enter his appearance in the circuit court, nor to a notice of trial.

Error to Wayne. (Brevoort, J.) Argued October 24, 1890. Decided October 31, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Stewart & Galloway, for appellant, contended:

1. In support of the right of the plaintiff to a judgment in form against both defendants, counsel cited *Brooks v. McIntyre*, 4

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Mich. 316; *Bonesteel v. Todd*, 9 Id. 371; *Zimmer v. Davis*, 35 Id. 39; *Holcomb v. Tift*, 54 Id. 647; *Welch v. Hull*, 73 Id. 47, and cases cited.

Edward A. Gott, for defendant Kegel, contended:

1. Defendant Kemp, having been served with process and having joined in the appeal, was entitled to notice of trial as provided by the statute and rule; citing How. Stat. § 7017; Circuit Court Rule No. 10, as amended April 23, 1889.
2. Strict proof of regular notice of trial on an absent party should be required as a condition to going to trial; citing *People v. Bacon*, 18 Mich. 250.

CAHILL, J. This suit was commenced in justice's court. The plaintiff had judgment for $130.25. The defendant Kegel filed an affidavit and bond for appeal to the circuit court. In his affidavit for appeal, he stated that he made the same in behalf of himself and Joseph Kemp. He also alleged—

"That such judgment was not in accordance with the just rights of the said Joseph Kemp and this deponent, and that this deponent and Joseph Kemp, conceiving themselves aggrieved thereby, appeal therefrom to the circuit court of the county of Wayne."

The bond on appeal was made and signed by Kegel, as principal, and Henry Michelsen, as surety, but was not signed by Joseph Kemp, nor by any one as his surety. The defendant Kegel entered his appearance in the circuit court by Edward A. Gott, his attorney. The defendant Kemp did not enter any appearance.

The case was duly noticed for trial upon Kegel's attorney for the September term, 1890. When the case was called for trial in the circuit court, the plaintiff was allowed to put in his testimony in support of his case, and rested. The defendants offered no testimony. The counsel for defendant Kegel requested the court to direct a verdict for the defendants, on the ground that no notice of trial had been served on defendant Kemp, and

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that he was not represented in court. The court charged as requested by counsel for defendant Kegel, and plaintiff's counsel excepted.

This ruling was erroneous. The defendant Kemp had not perfected his appeal. The statute requires that the party appealing shall give a bond to the adverse party, which shall be executed by appellant with one or more sureties, or by two or more sufficient sureties without the appellant. How. Stat. § 7000. By the next section, the sureties are required to justify their responsibility on oath. As already stated, Kemp had neither joined in the appeal-bond himself nor had it been executed by two sufficient sureties on his behalf. The judgment against him in justice's court, therefore, remained unaffected by Kegel's appeal. Kemp was not entitled to enter any appearance in the circuit, nor to any notice of trial there.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

CALPURNIA FLETCHER v. GEORGE K. FORLER ET AL.

Liquor traffic—Civil damage act—Pleading—Declaration—Amendment.

1. In a suit by a wife to recover damages alleged to have been sustained by reason of the sale of liquor to her husband when intoxicated, it is not necessary to allege that the saloon-keeper *knew* that he was intoxicated, that fact being presumed from the very nature of the case.
2. A declaration alleged the delivery and furnishing of intoxicating liquors to plaintiff's husband between certain dates, he being a person in the habit of getting intoxicated, so that he became wasteful and careless of his means, and deprived

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plaintiff of her proper support, and finally, on a specified day, by reason of such liquors furnished, in whole or in part, by the defendant, was fatally wounded, whereof he died; and that plaintiff, by means of such furnishing of liquors to her said husband, became greatly injured in her person, and also in her means of support. On the trial an objection was made to the admission of any testimony, on the ground that the declaration did not set forth a cause of action, which was sustained, and a verdict directed for the defendants, before the rendition of which the court refused an application by the plaintiff to amend. And it is held that the declaration contained all of the elements of statutory liability, and that the only objection, in substance, that could be raised to it is the failure to allege the defendant's knowledge that the husband was in the habit of getting intoxicated, so as to make the sale clearly unlawful; and that, when *such* a question is raised for the *first* time on the trial, an amendment should be allowed; citing *Ryan v. Fralick*, 50 Mich. 483, as laying down the correct practice.[1]

Error to Berrien. (O'Hara, J.) Argued October 28 and 29, 1890. Decided October 31, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Clapp & Bridgman, for appellant.

M. L. Howell and *O. W. Coolidge*, for defendants.

GRANT, J. This is a statutory action brought by plaintiff, under the liquor law of 1887, Act No. 313, for the recovery of damages alleged to have been suffered by her in consequence of the intoxication of her husband, alleged to have been produced by the sale to him of intoxicating liquors by the defendant William S. Forler, a saloon-keeper.

The declaration contained five counts. It is only necessary for the disposal of the case to mention the fourth count, which alleges that the defendant William S. Forler, contrary to the provisions of the above act, did,

[1] See *Fuller v. Jackson*, 82 Mich. 480.

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from May 2, 1887, to October 17, 1887, deliver and furnish to her husband, who was then, and during all that time had been, a person addicted to drinking, and in the habit of getting intoxicated, and of wasting his means in excess and drink, spirituous, malt, brewed, fermented, and vinous liquors, so that he became wasteful and careless of his means, and deprived plaintiff of her proper support; and that, on October 17, 1887, by reason of such liquors to him furnished, in whole or in part, by said defendant, her said husband became fatally wounded, whereof he languished and died; and that the plaintiff, by means of such furnishing and delivering of said liquors to her said husband, became greatly injured in her person, and also in her means of support.

The defendants George K. Forler and John L. Reddick were the sureties for defendant William S. Forler, who was not served with process, and did not appear in the case. The defendants George K. Forler and John L. Reddick pleaded the general issue. The case came on for trial, a jury was impaneled, plaintiff's counsel made his opening statement to the jury, and a witness was sworn. Thereupon the attorneys for the defendants objected to the introduction of any evidence, for the following reasons:

1. There was a misjoinder of counts.
2. There was a misjoinder of causes of action.
3. No count in the declaration sets forth any cause of action.
4. Under the counsel's opening, the matters stated by him could not be shown under the declaration.

Thereupon the circuit judge instructed the jury to render a verdict for the defendants, saying to them:

"The mere sale of intoxicating liquor to a person who is intoxicated, or the mere sale of liquor to a person in the habit of getting intoxicated, is not of itself a sufficient cause of action. The pleadings must allege that the

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sale was either unlawful, or that the person who sold it knew that such person was intoxicated, or knew that he was a person who was in the habit of getting intoxicated. The declaration in this case fails to allege either of those, and is therefore insufficient."

Before the verdict was rendered, plaintiff's counsel asked leave to amend the declaration, which request the court refused, and verdict and judgment were rendered for defendants.

The judge was clearly in error upon one point in his instructions. In this statutory action, counting upon a sal to an intoxicated person, it is not necessary to allege that the saloon-keeper knew he was intoxicated. That will be presumed from the very nature of the case. The fourth count was sufficient to sustain a verdict and judgment rendered thereon under the opening made by plaintiff's counsel. While it is perhaps subject to criticism, as being inartificially drawn, yet it contains all the elements of liability provided for in the statute. The only objection, in substance, that can be raised to it is the failure to allege that the defendant William S. Forler had knowledge that plaintiff's husband was in the habit of getting intoxicated, so as to make the sale clearly unlawful, within the contention of defendants' counsel, and the ruling of the court.

The plaintiff having asked leave to amend, the court should have allowed the amendment. A special demurrer would have raised the question, and secured its early determination. When such questions are raised for the first time upon the trial, the furtherance of justice requires that trial courts shall allow amendments. The course pursued by the trial court in *Ryan v. Fralick*, 50 Mich. 483 (15 N. W. Rep. 561), is the proper practice in *nisi prius* courts.

No other question was raised upon the record by the

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final action of the circuit judge in disposing of the case, and we therefore decline to pass upon the other questions discussed in defendants' brief.

Judgment must be reversed, with costs of both courts, and a new trial ordered.

The other Justices concurred.

WILLIAM WERTHEIMER AND MAX WERTHEIMER v. GEORGE S. HOSMER, CIRCUIT JUDGE OF WAYNE COUNTY.

Landlord and tenant—Lease—Mode of occupation—Covenants—Injunction.

1. A consent by a lessor that a third party may occupy the leased premises for a specified business under the lessee, who is to be responsible for the rent, is a restrictive waiver of conditions not to sublet or carry on any other than the kind of business to which the lessee is restricted by the lease, and applies only to such third person and to his specified business.
2. Covenants affecting the mode of occupation and enjoyment of leased premises run with the land, and the assignee, though not named, may be restrained by injunction from violating the same.

   So *held*, where a lease restricted the use of the building to the "sale of teas, coffees, and similar goods," and the lessors consented to its use by a sublessee for the sale of small musical instruments and sheet-music, who sublet it to be used for a misfit clothing house, which use was enjoined at the suit of the original lessors.

Mandamus. Submitted October 28, 1890. Denied November 12, 1890.

Relators applied for *mandamus* to dissolve an injunction. The facts are stated in the opinion.

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Sloman, Berry & Duffie, for relators.

Alexis C. Angell, for respondent.

LONG, J. This is an application for *mandamus* to compel the Honorable George S. Hosmer, circuit judge of the Wayne circuit, to dissolve an injunction issued on an *ex parte* showing, restraining the defendants, who are the petitioners here, from using and enjoying certain real estate, situate in the city of Detroit.

It appears that William B. Clark, Frank H. Clark, and Fanny B. Lane are the owners of a store building in the Detroit Opera House block. They filed their bill for injunction. The bill upon which the injunction was issued states substantially that on September 15, 1887, the complainants made a written lease of the store to one Carl H. Michell, to continue to April 30, 1891, by the terms of which Michell was to have the use of the store, to be occupied by him for the sale of teas, coffees, spices, and similar goods. Michell occupied for such purposes until about the month of April, 1890, when he moved into the store next adjoining, and requested the owners to permit one Thomas S. Sprague to occupy the premises for the sale of small musical instruments, and sheet-music, under him. The lease contained a clause that Michell should not assign or transfer the lease, or sublet the premises, or any part thereof, without the written assent of the lessors. Upon Michell's request, however, the owners, by their agent, assented to the occupying by Sprague under Michell, Mr. Michell to be holden for the rent; and he has continued to pay the rent therefor. Sprague continued in possession until the month of September, 1890, when he moved his entire stock out of the store, and vacated it. The bill states that on or about October 13, 1890, complainants discovered that William Wertheimer and Max Wertheimer had possession of the key of the store,

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and pretended to have some rights thereto, and requested permission to occupy the same for a misfit clothing house, which the complainants refused, and that the Wertheimers were then making repairs and changes in the interior of the store; that complainants then demanded the possession, and that they should desist from making such repairs; that the Wertheimers did desist from making repairs till about October 20, 1890, when they built platforms upon the floor, and caused shelving to be placed therein, and lettering upon the door advertising their business.

It is further alleged that the complainants never assented to the possession of the said Wertheimers, and that they have no right or lawful authority to occupy or use said store for a misfit-clothing house. It is also alleged in the bill that the said Wertheimers pretend and claim that they have rented said store from Sprague, and for the unexpired term under the Michell lease, and that they now propose to open the same for a misfit-clothing house. It is further alleged that the said Wertheimers are wholly financially irresponsible. It is prayed in and by the bill that the Wertheimers be perpetually enjoined from interfering with the floors, walls, windows, doors, or the other parts of the interior or exterior of said store, and from placing any sign or signs upon the same, and from making use of or occupying said store or any part thereof.

Upon the filing of this bill, an injunction was issued as prayed. The defendants, without answering the bill, entered a motion to dissolve the injunction, upon the following grounds:

1. Because the complainants have an adequate remedy at law.
2. Because the complainants do not, by their bill, make out a case entitling them to the relief prayed for.
3. Because the injunction was issued *ex parte*, and without any notice to the defendants.

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4. Because no bond was filed before said injunction issued as required by the statute.

5. Because said bill is not signed by the complainants or either of them.

6. Because this court has no authority by injunction to oust said defendants from the possession and enjoyment, or interfere with the enjoyment of said premises, except after the final hearing.

7. Because said defendants were in possession under a valid lease.

8. Because the material averments in said bill have been denied under oath.

This motion was based upon the affidavits of the defendants and Thomas S. Sprague and Robert Gray, and the files and records in the case. The motion came on to be heard before Hon. George S. Hosmer, and counter-affidavits were filed by the complainants. Upon the hearing, the court refused to dissolve the injunction. Application is now made to this Court to compel the circuit judge to set aside this order, and to dissolve the injunction. The injunction commands the defendants that they do desist and refrain from in any manner occupying or using the premises mentioned. Michell and Sprague were also made parties, and they are also enjoined from using the premises for any purpose except for the sale of teas, coffees, spices, etc., and of small musical instruments, and from permitting any other person to occupy the premises or any part thereof.

The affidavits of the defendants show that they, in renting the store, dealt only with Sprague, and had no knowledge that Michell had anything to do with the premises; that Sprague was in possession, and represented that he was authorized to lease the premises to them; that, after obtaining possession, they proceeded to repair the interior of the store at large expense; that, on October 13, they requested leave of Sprague to paint the outside of the store, and were referred by him to the solicitor

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of the complainants; that, upon applying to him, they were informed that he would not allow them to occupy, and requested them to desist from making repairs; that they did so until taking counsel, when they were advised they had the right to hold the premises, and, in reliance upon such advice, they have incurred about $1,000 expense, and have purchased $5,000, and upwards, of goods, which are in transit, and expected daily to arrive.

There is no question in the case now that the bill was not signed and verified by the complainants. This was permitted to be done in the court below, aud that question is not now pressed in this Court. The complainants in the injunction bill claim the right to have the injunction retained upon the grounds—

1. That Sprague, from whom the relators claim to have leased, had no right to give them a lease, and that relators were notified of this within three days after they took their lease; that Sprague's right could be no greater than Michell's, and that he (Sprague) was bound by the covenants of the original lease,—that he could not sublet without the permission of the lessors; that the mere fact of having consented to Sprague's occupancy was not a waiver of the terms of the written lease, only as applied to Sprague; that it is not true that, when Sprague entered, this requirement of written consent was waived; that the general rule that a license once given removes all restrictions applies only where expressly or impliedly the lessor is chargeable with intention to waive the restrictions absolutely; that the rule does not interfere with the lessor's right to make a restrictive waiver.

2. That complainants had a right to a remedy by injunction,—there was no adequate remedy at law; that proceedings before a commissioner could, by appeal, be stayed until after the expiration of the principal lease.

The lease itself is not set out in the record before us, but by reference to the bill it appears that the clauses of the lease to which reference is made are, substantially, that "the premises should be occupied for the sale of teas, coffees, spices, and similar goods," and that

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"Michell should not sublet or permit the occupancy by any other party, without the written consent of the lessors." It is conceded by the bill that the lessors assented to the leasing or subletting by Michell to Sprague.

A covenant not to assign or underlet the leased premises without the assent of the lessor is frequently inserted in a lease, and is regarded as a fair and reasonable covenant. But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part; but in order to have that effect it must be such a license as is contemplated in the lease,—that is, if the lease provides that the license shall be in writing, an oral license is not good. It is not to be understood, however, that this written stipulation not to sublet unless by consent of the lessor, in writing, may not be waived by an oral agreement; and such is not the contention of the counsel for the complainants here. The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease as to other parties, or for the carrying on of other business not contemplated by the lease, or the business to be carried on by Sprague. The consent that Sprague might enter and conduct the business of selling small musical instruments and sheet-music was a restrictive waiver of the condition, and applied only to Sprague and the business to be carried on by him. It gave Michell no right to lease to any other party, or to carry on a different business; and Sprague certainly could gain no greater rights than Michell had. The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business, Michell to be holden for the rent. Sprague had no right to sublet, and Michell no right to sublet to any one but Sprague, and for that particular business.

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The words contained in the lease, "to be used for the sale of teas, coffees, spices, and similar goods," amount to an express covenant not to be used for any other business. Covenants are not infrequently inserted in leases that the lessee shall not carry on particular trades upon the premises. This precaution often becomes necessary, not only for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good-will thereby diminished. Covenants of this kind, as they affect the mode of occupation and enjoyment, run with the land, and the assignee, though not named, will be liable to an action for damages, and may be restrained by injunction.

It is quite apparent that any legal remedy which the complainants might have pursued would not have been adequate. It is not a question merely of damages, but the right of complainants to control the premises or to put them to such uses as they might deem best. They restricted the use by the written lease, and it cannot be said that, by consenting to Sprague's use and occupation, complainants had waived or abandoned all rights over the property, so that it might be occupied by any person whom Sprague might see fit to put in, or with a business however obnoxious to the complainants, or detrimental to the good-will of the premises.

The court below was right in refusing to set the order aside, and in retaining the injunction. The writ must be denied.

The other Justices concurred.

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CECELIA A. HUNTER, ADMINISTRATRIX, ETC., v. ROBERTS, THROP & CO. (A CORPORATION) ET AL.

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Corporations—Dividends—Equity.

Courts of equity will not interfere in the management by the directors of the affairs of a corporation unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders.

Appeal from St. Joseph. (Loveridge, J.) Argued April 24 and 25, 1890. Decided November 14, 1890.

Bill to compel the directors of a corporation to declare and pay a dividend. Complainant appeals from a decree dismissing her bill. Affirmed. The facts are stated in the opinion.

S. M. Constantine and *W. G. Howard* (*T. R. Sherwood*, of counsel), for complainant, contended:

1. The court of chancery has power to compel the directors of a corporation to declare a dividend when, without reasonable cause, they refuse or neglect to do so; citing *Beers v. Spring Co.*, 42 Conn. 17; *Pratt v. Pratt*, 33 Id. 455; *Robinson v. Smith*, 3 Paige, 222; *Scott v. Fire Co.*, 7 Id. 203.

B. E. & L. F. Andrews and *Pealer Bros.*, for defendants, contended:

1. A request to the board of directors to declare a dividend was a condition precedent to bringing suit; citing *Lockwood v. Boom Co.*, 42 Mich. 537; *Detroit v. Dean*, 106 U. S. 541; *Hawes v. Oakland*, 104 Id. 450; and the doctrine that proof of a request is not necessary where it appears that it would result in a

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refusal can only apply in matters concerning which the directors have no discretion; citing *Williams v. Telegraph Co.*, 93 N. Y. 184; *Oglesby v. Attrill*, 105 U. S. 605; *Memphis v. Dean*, 8 Wall. 75; *Dudley v. Kentucky High School*, 9 Bush, 578; 1 Mor. Priv. Corp. §§ 240 *et seq.*, 450.

2. The discretionary power vested in the board of directors by How. Stat. § 4132, in the absence of fraud or what is equivalent thereto, and of which there is no evidence in this suit, is final and binding, and cannot be controlled by the courts; citing 1 Mor. Priv. Corp. §§ 276, 447, 460; *Moss' Appeal*, 83 Penn. St. 264; *Williams v. Telegraph Co.*, 93 N. Y. 192; and the directors have the best means of knowing the condition of the corporation, and of forming a correct estimate of its resources and liabilities; citing *Barnard v. Railroad Co.*, 7 Allen, 521; and they may use profits in the development of the corporate business; citing 1 Mor. Priv. Corp. § 447; *Moss' Appeal*, 83 Penn. St. 264; *Minot v. Paine*, 99 Mass. 101; *Elevator Co. v. Railroad Co.*, 85 Tenn. 703; *Gordon's Ex'ors v. Railroad Co.*, 78 Va. 501.

CHAMPLIN, C. J. Roberts, Throp & Co. is a manufacturing corporation organized under the laws of the State of Michigan, and engaged in the manufacture of threshing-machines and other agricultural implements. Complainant's intestate was a stockholder in the corporation, and she has filed the bill of complaint in this case to compel the directors of the corporation to declare and pay a dividend. The bill of complaint was dismissed by the court below, who filed a written opinion in the cause, which has been returned with the record. After a careful perusal of the testimony, I am led to the conclusion reached by the circuit judge, and mainly for the reasons given by him in his opinion, as follows:

"The defendant is a corporation duly organized under the laws of this State, and has been engaged in the business of manufacturing principally threshing-machines for many years at Three Rivers, in this county. The articles of association provide for $250,000 capital stock, but $80,000 only has ever been issued. This amount was issued before 1881, and was fully paid up. The complainant, as such administratrix, holds $6,000 of this stock, for which her former husband, Lothrop, paid, in 1881, $9,000. Since

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then no dividend has been made by said corporation defendant, and the complainant files this bill to compel the defendant to declare a dividend on its capital stock of $80,000, alleging that it has surplus profits which should be set apart and used for that purpose. No request has ever been made to the defendant's board of directors to declare a dividend, but since a majority of such directors have been witnesses upon this trial, and have testified that they would not have declared a dividend if a request had been made, I think it should be held for the purposes of this trial that no request was necessary.

"It is undoubtedly true that the ultimate object for which every corporation of the character of the one under consideration is formed, is the payment of dividends to its individual members. While this is true, it is also true that the declaring of such dividends must ordinarily be left to the sound discretion of boards of directors. Whether a corporation can safely make a dividend involves the exercise of knowledge and judgment, and the power of deciding this question should not be taken from the directors, and assumed by the courts, unless it clearly appears that the directors have mistaken their legal duties. Any other rule would lead to the frequent intervention of the courts, to the substitution of the court for the board of directors, and, in very many instances, would prove disastrous to the best interest of the corporation and its stockholders, and the business of trading and manufacturing would be seriously hampered and retarded. To authorize the court to intervene, and decree a dividend, it ought, in the first place, to appear clearly that there are surplus profits to divide, and that such profits can be separated from the necessary working capital, for the purpose of a dividend, without serious detriment to the interest of the stockholders and the prosperity of the business of the corporation. It ought to appear that there is no good reason for withholding a division of the surplus earnings among the stockholders, and that they are withheld from the will or caprice of the directors. If there is reasonable cause for withholding the dividend, then it ought not to be decreed.

"The evidence shows that the books of the company are kept in excellent system, and with great accuracy, and a full and fair showing has been made of the business and condition of the company. Although there have been losses, it cannot be said but that they were unvoidable, and incident to the necessary risks of the defendant's business. The evidence further discloses that the directors are men of large experience in business affairs; that they are familiar with all the details of the business of the company; and that, according to their best judgment, for the best interests of the stockholders, a dividend cannot now, and could not have been,

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made, and in this respect their opinions are at unity. The evidence entirely fails to disclose that the directors, in not declaring dividends, have been actuated by malice or improper motives. They are largely interested in the corporation, and in their testimony say that, as individuals, they would have been glad to have declared a dividend, and had themselves the benefit of it, if the condition of the finances of the company would have permitted such action; but they declare emphatically that such dividend cannot be made without great detriment to the best interests of the company and its stockholders. And, since these directors are men of high standing as business men, and of unquestioned integrity, I am bound to believe that, according to their best and united judgment, a dividend ought not to be made.

"I am aware that it is pretty well settled by authority that 'there can be such a condition of things as will justify a court of equity in compelling directors to declare a dividend contrary to their judgment;' but when a board of directors made up of experienced business men, largely interested in the welfare of the corporation, familiar with all its affairs, and influenced by no improper motive, declares that a dividend cannot be made without serious detriment to all concerned, then the court ought to proceed with great caution in decreeing a dividend, and the facts proven upon the trial ought clearly to justify such action. It is necessary, therefore, to look somewhat into the condition of the company in order to determine whether the court ought to order a dividend against the best judgment of the directors.

"In 1881 the company was largely reorganized. Before that time it had been doing a very successful business. During that year, Throp, or the Throp family, sold out their interests in the real estate, tools, and fixtures, and some other property, to Roberts, receiving in cash $60,000, and receiving also one-half of all the available assets of the company, consisting of paper owing to the company, and amounting in gross to $100,000, or over. As far as the evidence discloses, the $80,000 of stock was before this sale owned by Roberts and Throp. Roberts became the purchaser of the Throp interest. He thereupon sold to other persons a considerable portion of the stock on the same basis that he had bought of Throp; that is, 1½ for each share. This, upon the $80,000 paid-up stock, aggregated $40,000. Since then it has been carried upon the books, and appears in some of the annual statements as a surplus fund of $40,000. In fact, it was regarded as a premium on the stock for the good-will of the business. So far as stock was sold, this premium was received by Roberts individually, and did not go to the benefit of the funds of the company. Considering the actual value of the company's property, it is questionable

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whether the stock of the company has any real value above par. The $40,000 for good-will was largely speculative, based upon the supposed ability of the company to make money in the future.

"When the company began business after this partial reorganization, its property consisted of its real estate, the tools, machinery, and fixtures, and probably some material and unfinished work. It had no money. Its available assets had been divided and appropriated between Roberts and Throp, and among its first acts was to borrow $1,000 to meet current expenses. On the basis paid by the new stockholders, the value of the stock should have been $120,000. They undoubtedly expected that, if it was not then worth that amount, it would be made good by the earnings of the company. Among these new stockholders was the complainant's decedent, who had a position and salary as an employé of the company, and was familiar with its financial condition and affairs. Since the company, after the sale and division between Roberts and Throp, had no money or available means, it must have been contemplated by the stockholders and directors that the first manufactured products of the company would be obtained by means of borrowed money, and that for a considerable time to come the earnings and profits of the company must be applied to its floating debts, and the expenses of manufacturing and selling its products, and development of its business. It must have been contemplated that the company would engage exclusively in the business for which it was organized, and especially so in the somewhat new existence that it entered upon after the reorganization.

"Courts cannot but take notice of the fact that the competition in all kinds of manufactured goods is so severe (and the evidence shows that it is especially so in the line of threshing-machines) that the profit upon each article is small, and in no other way can money be made than by manufacturing, putting upon the market, and selling a large number of the manufactured articles. Considering the value of the plant, and the amount of money paid by the new holders for their stock, it could not have been contemplated that the company would restrict its business, and build but a small number of machines. Such action would inevitably have defeated the evident intention and expectations of the stockholders. And it must have been quite as evident that a large business could not be carried on without a large amount of working capital. As the stockholders were not called upon to furnish this, it could not be supplied in any other way than from the earnings of the company. From these earnings the business of the company has been carried on from year to year for a period of some eight years, and the directors testify that at no time during this period could they safely take from these earnings any money, and set it apart for the purpose of declaring a dividend.

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"The period of time at which the complainant asks the court to interpose and decree a dividend is at or about the time of filing her bill, December 1, 1887. An examination of the financial report and balance sheet of December 12, 1887, discloses the fact that at that time there was no money on hand from which a dividend could be paid. The bills receivable, or paper and accounts owing to the company, are the only resources from which money could be realized to make a dividend. It must have been obtained in that way, or by borrowing the money for that purpose on the credit of the company. The reports show that at that time the floating indebtedness of the company was large, but the bills receivable were largely in excess of such indebtedness; and counsel for complainant has argued, with much force, that a sufficient amount can be safely spared from this excess, and the money realized upon it, to make a dividend.

"A careful consideration, however, of the nature of this paper, and the condition of the company's business, satisfies me that this cannot be done in the exercise of that prudence and care which is essential to the safety of the company's business, and the substantial interests of the stockholders. The evidence shows that this paper, taken in payment of the company's machines, is long-time paper, running from one to four years. Its actual value is from 60 to 70 per cent. of its face, but could not be sold for more than 50 per cent. A much larger amount could be realized upon it if left in the control of the company's agents than in any other manner, and if placed in hostile hands it would endanger the company's business in making future sales. The machines for the sales of the coming season must necessarily be built in early winter, and the expenses for material and labor correspondingly large. In the usual course of collection, no more money can be realized from bills receivable than is actually necessary to pay the expenses of material, manufacturing the goods, insurance, taxes, and expenses of making sales and collections, and not enough to extinguish readily the floating indebtedness of the company. The so-called 'surplus profits' are tied up in this paper, and it is evident that a sufficient sum cannot be got out of it to make any considerable dividend without great sacrifice, and not then except at the necessity of driving the company to add largely to its indebtedness to obtain money to carry on its business and pay its current expenses.

"The complainant, in her bill, sets forth the embarrassments of the estate of which she is administratrix, and the financial condition of her family. This state of her affairs is well calculated to appeal to the sympathies of the court, and to lead it to endeavor to find a way within the bounds of the law and the evidence to afford adequate relief. It is evident that a small dividend, such a one as the company might perhaps, without great sacrifice, raise the

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money to pay, would be of but little assistance to the complainant. Her counsel ask the court to make an order for a dividend of 100 per cent. upon the $80,000 of issued stock. A sum much less than this would not relieve the complainant from her financial needs. On the other hand, the raising of $80,000 on the bills receivable for the purpose of making a dividend would, it is evident, so embarrass the company, and deprive it of means to carry on its business, as to involve it in disaster, and probably in irretrievable ruin, and the stock held by the complainant would be involved in the disaster. The directors, acting in good faith, are positively of the opinion that a dividend cannot be ordered without grave injury to the interests of the company and its stockholders. They are the legally appointed agents and trustees of the stockholders, and their judgment should not lightly be disregarded. I am also satisfied that the evidence fully sustains the judgment of the directors.

"The bill must be dismissed, but without costs against the complainant."

The corporation was organized in 1875, with an authorized capital of $250,000, only $80,000 of which was paid in. It did business until March, 1881, when a change was made in its stockholders, one of the Roberts purchasing the Throp interest, which was represented by 1,600 shares at $25 each, for which he paid $60,000. At this time the notes and money were divided, leaving the corporation without available capital or means to carry on the business. In this crisis the corporation resorted to borrowing, and from that time until December 12 following it had borrowed money and obtained credit to the amount of $37,903.71, of which $26,756.14 was represented by bills payable, and the balance in open account. The sales of its manufactured articles have been made in several states from Michigan to Texas and the Dakotas, and are made through agents or traveling salesmen, and mostly upon a credit of from three to four years. Notes of the purchasers have been taken upon sales, which, from the length of time and the distance of the parties, have not been bankable paper, and the corporation has been obliged to be a steady borrower and purchaser upon credit year by year. In 1882, its bills and accounts pay-

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able amounted at the close of business, December 12, to $72,954.54; in 1883, to $59,787.65; in 1884, to $89,989.91; in 1885, to $69,880.46; in 1886, to $84,088.15; in 1887, to $81,006.91. These items show that it required a large amount of ready money to carry on the business, and it was laid out in merchandise purchased, additional tools and machinery, and the expenses necessary to the manufacture and sale of the manufactured product, as shown in the respective accounts upon the books of the corporation. During the same time, the corporation steadily increased its bills receivable, which, added to debts due to the corporation upon open account, showed a steady increase of assets over liabilities year by year; yet the real value of such assets was much below their nominal value, owing to the nature of the credits, as before stated. Different witnesses familiar with this paper placed their estimate of its real value ranging all the way from 30 to 50 per cent. less than its face. There is no testimony in the case showing, or tending in the remotest degree to show, that the business has not been well and economically managed. The salaries paid the officers are moderate and reasonable in amount, and, in my opinion, well earned. The proof is without contradiction that at no time since the complainant's intestate became a stockholder have the assets of the corporation been in a condition where a dividend to the stockholders could be made without serious detriment to the business of the corporation, by crippling its resources, and compelling it to discontinue business. Indeed, this fact is quite evident from the amount of capital required to carry on its business, the nature of its assets, and the amount of its liabilities.

The statute under which the corporation was organized provided that—

"If the directors of any such corporation shall declare

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and pay a dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, knowing such corporation to be insolvent, or that the payment of such dividend would render it so, the directors assenting thereto shall be jointly and severally liable, in an action founded on this statute, for all debts due from such corporation at the time of paying or declaring such dividend."[1]

In view of such liability, a court of equity should pause and ponder well before compelling a board of directors to declare and pay a dividend in a case where each individual director testifies that the corporation cannot pay a dividend without serious injury to the business of the corporation, and the president and general manager testifies that such a step would have injured their business so that they would have had to wind it up. The statute also provides that the stock, property, affairs, and business of every such corporation shall be managed by its directors.

It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount. 5 Amer. & Eng. Enc. Law, 725. Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders. Such is not the case here. The directors themselves own the largest share of the stock, and testify that they are anx-

[1] See How. Stat. § 4149.

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ious to receive a dividend whenever it can be made without injury to the business. They have not diverted nor misapplied the funds of the corporation. They have exercised the best of faith towards the stockholders. The books of the corporation show judicious management, and that a surplus of net earnings had accrued from year to year to and including the year 1887, which may be considered "net profits," which term has been defined to be what shall remain as the clear gains in any business venture after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution. *Park v. Locomotive Works*, 40 N. J. Eq. 114 (3 Atl. Rep. 162). By referring to the balance-sheet at the close of the business December 12, 1887, it will be seen that the capital invested in the business was:

Real estate	$27,869 42
Tools and machinery	21,160 50
Merchandise	41,783 54
	$90,813 46
Bills payable	$56,917 07
Accounts payable	24,089 84
	$81,006 91

The items of the account under the head of "Real Estate," "Tools," etc., and "Merchandise," are not available for the payment of dividends, and may be set aside as so much capital invested in the plant and product. The resources out of which profits may be expected to arise at that date will have to be scaled down to actual value as shown by the testimony, and perhaps the lowest estimate placed upon them by the witnesses should be adopted, if we are to sit in judgment upon the discretion exercised by the directors in the management of the business. The lowest estimate of the value of the bills receiv-

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able and accounts receivable is 50 per cent. of their face value. The face value, as shown by the balance-sheet of December 12, 1887, is as follows:

Bills receivable	$173,616 16
Accounts receivable	87,179 90
Total face value	$260,796 06
Fifty per cent. of this is	$130,398 03
Add cash in bank and safe is	2,396 05
	$132,794 08

If from this sum we deduct the bills and accounts payable as above stated, there remains $51,787.17 as net profit. Now, since in this calculation all the liabilities have been provided for, and all losses likely to arise from the conversion of the notes and accounts into money have been eliminated, and as the corporation has on hand merchandise of the value of $41,783.54, which consists of unsold manufactured articles, and raw material on hand to be used in manufacturing, it may be asked, why may not the whole or a considerable part of this net profit be appropriated to the payment of dividends to stockholders? The answer is that it would deprive the corporation of the means from which to carry on its business. If this class of assets could be converted into money, and the debts and liabilities of the corporation paid, it would leave a working capital in the hands of the directors of $51,787.17. This sum is insufficient to carry forward the business. The balance-sheets from the books show that about $20,000, on an average, is paid out for merchandise, which, in this instance, is the raw material, wood, and iron, etc., used in manufacture. The expense account, as contained in the balance-sheet of December 12, 1887, shows that the operating and other expenses of 1887 were $56,765.26, making a total of $76,765.26 required to carry on the business a year. This shows that the $51,787.17

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could not be drawn out from the business and divided without disaster, and compelling a winding up of the corporation. It is true that the directors would have on hand merchandise of the value of $41,783.54, consisting of manufactured articles and material for manufacture, but this could not be made available as a means to carry on the business, for the expense of manufacture must be met at once, and the necessities of the business require that sales of manufactured goods shall be made upon three and four years' time, and the directors could derive no available means from this source to meet the necessary and current expenses of the business, and the result would be the utter inability of the corporation to continue business. Indeed, this is apparent from the fact that as the business is now conducted, with the notes maturing, the corporation is obliged to borrow money and obtain credit in open account to the amount of $81,006.91, as shown by the statement of December 12, 1887, for that year. And this is about an average for several years previous. It is evident that no dividend can be paid without borrowing the money for that purpose, and no court of equity will compel a board of directors, against their judgment and wishes, to borrow money to pay dividends.

The item in the trial balance called "Surplus Fund" is not an asset, but what is not fictitious is a liability, if anything. It is composed first of a fictitious entry of $40,000, supposed to represent premium on the stock. The balance is made up of the difference between the inventory of merchandise and the "Expense Account," which is called "net gain," and carried into the capital stock account as "Surplus Fund." If it represents capital stock, it is a liability equivalent to a stock dividend of that amount to be divided *pro rata*. It does not, however, represent a real asset, and is not carried into

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the financial statement of "Resources" and "Liabilities." The merchandise inventoried became converted into bills and accounts receivable, and these in turn are used in payment of liabilities. So that, in estimating the standing of the corporation, this "Surplus Fund" account must be entirely omitted. This "Suspense Account" as kept is a fictitious account. It was opened for convenience, and was designed to represent losses upon debts due the corporation, estimated at 10 per cent. of all such debts. The testimony shows that this estimate was too small, and that such losses equaled or exceeded 30 per cent.

For reasons stated above and in the opinion of the circuit judge, I am of opinion that the decree should be affirmed, with the costs of this Court.

GRANT and LONG, JJ., concurred with CHAMPLIN, C. J.

MORSE, J., *(dissenting)*. William H. Lothrop, the husband of the complainant, in March, 1881, then in the employ of Roberts, Throp & Co., a corporation organized and existing under the laws of this State, purchased 240 shares of stock in said corporation, of the face value of $6,000, and of the actual value of $9,000, which last-named sum he paid for said stock. He continued in the employ of said corporation until November 27, 1882, when he died. The business of the corporation is located at Three Rivers, where Lothrop resided at the time of his death. Lothrop left surviving him his widow, the complainant, since remarried, and two children, now aged 12 and 15 years respectively, and residing with their mother.

When Lothrop died, the principal part of his estate consisted of this stock. Inventorying this stock at $9,000, his estate was appraised at $14,110.40, $229.10 of which was household furniture, and consisted entirely of per-

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sonal property. There were $4,180.85 of debts proved against his estate. Up to the present time the widow has been unable to sell this stock at its cost. No dividend has ever been declared upon it. The debts are unpaid and drawing interest, and she has been obliged to increase her indebtedness in order to support herself and her children.

She filed the bill in this cause in December, 1887, as administratrix of the estate of Lothrop, praying that the circuit court in chancery for the county of St. Joseph inquire into and ascertain what amount of the surplus profits and earnings of said corporation are now on hand under the control of said corporation; and that the persons acting as its managers and directors (who are also made parties defendant with the corporation) be required to account and make showing of all the moneys and property of said corporation now held and owned by it; and that it be decreed that the directors of said corporation be ordered and required to pay on the stock of said corporation held by her as such administratrix, and the other stockholders thereof respectively, such dividend as to the court might seem proper.

The undisputed facts as to the existence and management of this corporation show a peculiar state of things, to say the least. The corporation was organized in 1875, for the purpose of manufacturing and selling agricultural implements, and the period of its corporate existence was fixed at 30 years. The capital stock was fixed at $250,000, and consisted of 10,000 shares, at $25 each. The full amount of stock subscribed for was $80,000, all of which has been paid up. No certificates have ever been issued for a greater amount than $80,000. The stock was at first owned entirely by two families, Roberts and Throp. In 1881, Throp and his sons, who owned half, sold out to Roberts. At this time all the surplus

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profits and accumulations were taken out and divided among the stockholders, but it was considered after this was done that the stock was worth $1.50 upon the dollar, and Roberts paid the Throp family $60,000 for their $40,000 of stock. He then sold some of the stock to other parties, at the same value at which he purchased it, Lothrop paying $9,000 for $6,000 of stock at face value. The stockholders, as shown by the annual report filed January 28, 1888, outside of the Roberts family were: Joseph W. French, 400 shares; C. L. Blood, 280 shares; William H. Lothrop estate, 240 shares; C. Schafer, 43 shares; and M. H. Bumphrey, 25 shares. The directors December 31, 1881, were Cyrus Roberts, George A. Roberts, Samuel H. Roberts, James B. Roberts, Horace Roberts, and Joseph W. French.

The by-laws provide that there shall be elected for the first year six directors, who shall be chosen annually, according to law, on the second Tuesday in December in each year. There has never been a meeting of the stockholders, as appears by the records of the company, since March 26, 1881. There is in the records a meeting headed "Special Directors' Meeting," held November 14, 1887, which was called to order by Cyrus Roberts, president.

"Present: Cyrus Roberts, George A. Roberts, James B. Roberts, J. W. French.

"Minutes read and approved. Moved by J. W. French, and seconded by James B. Roberts, that we proceed to a formal ballot for director to fill vacancy. George A. Roberts acted as teller, and announced four ballots as having been cast, of which C. L. Blood received four ballots, and was announced as unanimously elected.

"Moved by J. W. French, and seconded by James B. Roberts, that we do now adjourn. Carried.

"M. H. BUMPHREY, Secretary."

The secretary, Bumphrey, testifies that there was a stockholders' meeting on December 13, 1887, but there is

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no evidence that any one was notified or attended except the directors and secretary. This was after the filing of the bill in this cause. The directors elected in 1881 have held over and managed the corporation ever since the first election, in March, 1881, and it seems to have been managed principally in the interest of the Roberts family. Cyrus Roberts is president; salary, $800. One of his sons is treasurer; salary, $1,000. Another is foreman of the shops, at $15 per week. Bumphrey is secretary, at $1,000 per year. French and Blood are now directors, leaving the complainant and Schafer, who has 43 shares, the only stockholders left out of active participation in the management of the corporation. The by-laws also prescribe that the directors shall meet on the first Monday evening of every month. There has never been a regular meeting of the directors since their election. They held four special meetings in 1881, March 26, March 28, May 26, and December 19; one April 6, 1882, July 29, 1885, and November 14, 1887, at which last meeting a director was elected to fill vacancy without authority to do so.

The annual statements filed by the directors or a majority of them in each year show as follows:

Year ending December 31, 1881:

Capital stock paid in	$80,000 00
Liabilities	39,613 55

1882:

Capital stock paid in	80,000 00
Liabilities	74,056 40

1883:

Capital stock paid in	80,000 00
Liabilities	59,787 65

1884:

Capital stock paid in	80,000 00
Liabilities	71,962 45

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1885:

Capital stock paid in	$80,000 00
Invested in real estate	26,875 15
Personal estate	56,111 46
Debts	93,825 12
Credits	235,285 43

1886:

Capital stock paid in	80,000 00
Invested in real estate	27,231 99
Personal estate	62,427 96
Debts	108,032 81
Credits	263,780 96

1887:

Capital stock paid in	80,000 00
Invested in real estate	27,869 42
Personal estate	62,964 36
Debts	81,006 91
Credits	263,171 79

1888:

Capital stock paid in	80,000 00
Real estate	28,532 74
Personal estate	56,444 21
Debts	51,628 18
Credits	191,651 16

The last report was made January 25, 1889, about a year after this suit was commenced. All these reports except the last are sworn to as true by either the secretary or treasurer, except 1885, 1886, and 1887, which are sworn to by the secretary, Bumphrey, to be "true and correct, to the best of my knowledge and belief." The last one does not appear to be sworn to at all, but this may be a mistake of the record, as it does not appear to be signed by any one. These statements, which ought to be presumed to be true, show that at the close of the year 1887, about the time this bill was filed, this corporation had, in excess of its capital stock, real and personal property to the amount of over $10,000, and credits exceeding its indebtedness in the sum of $182,164.88; and

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yet it is not able to declare a dividend. But this is not all. We have in the record the balance-sheets of the corporation at the close of business from the year 1881 to 1888, inclusive. It starts in 1881 with a capital stock of $80,000, and $40,000 surplus. This surplus is supposed to represent the added value of the shares when Roberts bought out the stock of the Throp family, and may or may not amount to anything. It is claimed by the defendants that this only represents an estimated value which may be fictitious, but complainant contends that it is real and substantial, and represents in fact so much value. The net gain figured for that year was $17,744.46, which, added to the capital and surplus, made a basis of $137,744.46 net capital for the year 1882. The net gain for that year was $50,352.59, which started 1883 with a net capital of $188,097.05. The net gain for 1883 was $28,249.02, making net capital for 1884 $202,726.69, as shown in the report. In 1883 appears for the first time an item called "Suspense Account," of $13,619.38, which seems to have reduced the net capital to the figures given above. The net gain for 1884 was $20,728.39; starting 1885 with a net capital of $223,455.08, the suspense account remaining the same as in 1883. In 1885 the net gain was $11,317.12. Net capital for 1886, $224,446.92; suspense account increasing to $23,944.66. In 1886 net gain $20,961.18. Net capital for 1887, $245,408.10. Suspense account same as 1885. In 1887 net gain $3,645.90. Net capital for 1888, $249,054. Suspense account same as 1885. In 1888, in the report filed after the commencement of this suit, we find the first loss. Net loss $47,993.73; leaving net capital for 1889, $201,060.27. Suspense account, $23,944.66. One of the directors accounts for this loss in his testimony. It was made up of losses in Texas upon corn-shellers for the years 1886 and 1887, and not charged until 1888, and of notes before that

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time, classed as "bills receivable," and which were considered worthless and charged off as loss in 1888. The suspense account was attempted to be explained by some of the officers of the defendant, but the explanation was not very clear. The counsel for the complainant claim that it is an asset instead of a liability, which would increase the surplus of the company over and above its debts and capital stock double the amount of such account, to wit, $47,889.32. The explanation of the secretary of the corporation as to this suspense account is as follows:

"There is the suspense account. It was ten per cent. net gain in 1881 on collections, $1,774.44; ten per cent. net gain 1881, machinery and inventory, $1,774.44. Then in 1885 there was ten per cent. of the 1882 collections charged over, $5,035.25. It was not charged off the books, but held in suspense. Ten per cent. net gain of 1882, machinery and inventory, $5,035.25; ten per cent., 1883, collections, $2,824.90; ten per cent., 1883, machinery and inventory, $2,824.90; ten per cent., 1884, collections, $2,072.83; ten per cent., 1884, machinery and inventory, $2,072.83. Then there was $529.82, when I footed up to carry forward; that was an error that was not discovered until the report was entered. Instead of crediting back, I charged it, and it made the trial balance all right.

"*Q.* How much was this suspense account?

"*A.* It was $23,944.66. * * * * * *

"*Q.* I want to ask a little more about the suspense account. The suspense account by the figuring you have made there is charged as a liability?

"*A.* No, sir; not at all.

"*Q.* It is so much money deducted from the surplus?

"*A.* Yes, sir; but it stands as a separate account.

"*Q.* I understand it is a sort of sinking fund?

"*A.* No, sir; not at all. It would be a fund on the other side.

"*Q.* You have gone through and charged up ten per cent.?

"*A.* No, sir; not by any means. It was simply an estimate ordered by the board of directors. We did not

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go through and take any special account, but simply took ten per cent. of the net gain in those years included in the surplus, and held it as a suspense account.

"*Q.* That was held to cover any possible contingencies?

"*A.* Yes, sir; if we had losses.

"*Q.* And if you had no losses, it would be so much more money?

"*A.* Certainly.

"*Q.* So that account is held in suspense?

"*A.* Yes, sir.

"*Q.* In other words, you had that, so as to be on the safe side?

"*A.* I think it is a business principle that is generally exercised.

"*Q.* It was really an account set aside on your books?

"*A.* Yes, sir.

"*Q.* To cover any losses?

"*A.* Yes, sir.

"*Q.* Then, if you have no losses, it would not be taken out?

"*A.* Certainly not. You are right."

He further testified that the suspense account was simply a percentage charged up as a precaution against loss. As near as I can ascertain, this suspense account is on the right side of the column as to debits and credits, as it is charged upon the books of the corporation. It is treated as a liability, but it may not be one. The corporation has had credit for this amount in its bills receivable and inventory of property. This suspense account is 10 per cent. of the net gain of each year, charged over to the debtor side, to meet anticipated or estimated losses on such net gain as now credited on the books. If they have that amount of losses, then the balance remains as it is now; if not, this $23,944.66, or so much thereof as is not used to meet losses, is to be added to the balance as it now stands. It it not doubled when it goes back, as complainant's counsel claim. It really has never been taken out of the assets. In theory

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it has been by charging it as a debt, but even in theory it has been deducted from the credit side but once. This has been done by charging it to the debtor side of the ledger, while it still remains on the credit side among the other assets. If paid out for losses, the balance will not be disturbed on the books, unless it is charged upon the debit side again as it is paid out, and the real balance will be as now shown on the books. But I shall consider the case independently of this suspense account.

When this bill was filed, or at the end of the corporate year for 1887, the net capital of this corporation appeared by the sworn statement of its officers to be $249,054. Its real estate and personal property on hand amounted to $90,833.78, or $10,833.78 more than the capital stock paid in. Its credits exceeded its debts $182,164.88. Add to this the excess of property over capital stock, and we have $192,998.66. Now deduct from the net capital, $249,054, the capital paid in, $80,000, and we have left $169,054. Add to this the suspense account of $23,944.66 and we have again the $192,998.66 Now give the defendant corporation the benefit of the suspense account, and we still find it after its capital stock of $80,000 and all its liabilities are paid, suspense account included, with a clear surplus of $169,054, in property and credits. But it is claimed by the defendants' counsel that $40,000 of this surplus is fictitious, and never had any existence in fact. If we grant this, we still find a surplus of $129,054, earned in seven years, or an average of $18,436 per year. This $40,000 surplus arose in this way: From the organization of the corporation in 1875 up to 1881, when Roberts purchased the interest of Throp, it is admitted that large profits were made in the business. So great were these profits that Roberts, Sr., testifies that when he and Throp divided up, each taking one-half of the money and notes that belonged to the corporation, there was over

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$100,000 in notes, $50,000 each. The amount of money drawn out does not appear, but in one place he says that each drew out the money they put it, to wit, $15,000 each. He claims that he lost $15,000 on his share of the notes, but that left him $35,000 on the note account. After they had thus divided up the moneys and notes belonging to the corporation, there was still left the plant. They valued this, and the machinery, lumber, iron, and machines on hand, when the company was first started, at $50,000, and then put in $30,000 in cash, $15,000 each, thus making the capital stock paid in $80,000. There was $7,000 or $8,000 worth of improvements made in the plant before 1881. They estimated between themselves, in 1881, the plant, machinery, and personal property on hand, after taking out the moneys and notes, with the good will of the business, to be worth $120,000, and Roberts thereupon paid Throp $60,000 for his half of the capital stock. A dollar of the stock was then supposed to be really worth a dollar and a half, and it was at these figures that Roberts, after he had acquired all the stock, sold some of it to other parties, including the stock purchased by Lothrop, who gave $9,000 for $6,000 of stock. Now it is claimed that the plant and property was not worth any more than $80,000. In other words, the $40,000 that was credited up to surplus, showing the real capital to be $120,000, and upon which showing Roberts sold this stock to Lothrop and others, was a fictitious sum, and never existed in fact, although it has been carried as a surplus ever since. But, if this is so, still every dollar of the stock is now worth about 2¼ dollars, according to the sworn statements of the company, if the credits are worth their face value. It is not claimed that the real estate and personal property is inventoried above its actual value.

The first objection against the granting of a decree in

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favor of the complainant is a technical one. It is said she has never applied to the board of directors when they were in session asking them to declare a dividend, and that application to single directors separately is not sufficient under the authorities. But it is shown by the proofs that the complainant has, by herself and through duly-authorized agents, applied to several of the directors, and those the managing ones of the corporation, to declare a dividend, and they have refused to do so, and all of them swear that they would not have declared a dividend if she had applied to the board when it was in session. When we consider that there has never been a regular meeting of the directors, and but a few meetings at all, that there never has been a meeting of the stockholders except after her bill was filed, that she had no notice of this meeting, or of any meeting of the directors, that the directors own almost the whole of the stock, and can control a stockholders' meeting as easily and fully as they can a meeting of their own board, it is manifest that any action that she might have taken before a stockholders' or directors' meeting would have been futile and useless. Under such circumstances, equity does not require that she should go to the expense of any such action. "The law does not require an idle ceremony to ground an actionable right." *Donkersley v. Levy*, 38 Mich. 57.

It is clear to me that there has been an object in the whole course and proceeding of this corporation. There has been an evident design to "freeze out" this small stockholder, the complainant, and she, a woman, presumably not well acquainted with her rights, nor with the strength and purpose that a man would have to assert and enforce them. This is shown by their non-compliance with the law as to both directors' and stockholders' meetings; in keeping one set of directors in, in violation of law, and calling no meeting of stockholders to elect their

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successors as their times expired; in paying no attention whatever to her rights as a stockholder under the law, treating her the same as they would an entire stranger to the transaction; in advising her to sell her stock, and offering her the munificent (?) sum of the face value of it, $6,000, with interest at 6 or 7 per cent., when her husband paid $9,000 for it. In fact, the corporation has been run in the interest of the Roberts family at the expense of this poor woman, and the directors gravely inform the court, in substance, that they must continue to so manage it or bring ruin upon the corporation. There is and can be no excuse for this conduct. Nor does it avail these directors that they "are men of high standing as business men, and of unquestioned integrity," as found by the circuit judge. The facts in this case must govern this record, and justice and equity prevail, notwithstanding the high character of the board of directors as individuals. It is plain that the usual object of a corporation is not to accumulate profits, and add them to the capital stock, but to make and divide each year, if possible, profits as dividends equally among the shareholders. If profits are made, the amount to be declared as a dividend is within the reasonable discretion of the directors, but it is admitted by the circuit judge, who dismissed complainant's bill, that—

"There can be such a condition of things as will justify a court of equity in compelling directors to declare a dividend contrary to their judgment."

The directors of a corporation have a discretionary power to a limited extent to accumulate the profits of the company, but they cannot go on accumulating them indefinitely. After a reasonable limit has been reached, every shareholder has a right to insist that they shall be distributed as dividends. 1 Mor. Priv. Corp. § 452. And the courts have a right to interfere in behalf of the

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stockholder, and order a dividend, when it is clear either that the directors have acted in bad faith or from a mistaken view of their legal duties. Id. § 460.

The question to be here decided is, was it the duty of the directors at any time to declare a dividend, and have they wrongfully refused to distribute the profits, or any part thereof? If so, the complainant is entitled to relief. It must be remembered that the record shows that this corporation was first organized on the basis of a capital stock of $250,000, but only $80,000 has ever been issued. The net capital when this bill was filed had been increased by the showing of the company upon its books to $249,-054. Deducting the $40,000 (said to be speculative only, but of which complainant's husband paid his *pro rata* share, $3,000, when he bought his stock), and we have, in round numbers, $209,000. For this accumulation of profits or capital no stock dividends have been issued, or no new shares created. It has been simply left in the business, to be controled and managed by the directors. As far as her stock is concerned, the complainant has nothing to show for this increase, and it seems that in the estimation of the directors, or some of them, who made her offers, or put a value upon it to her attorney, her stock is not worth any more than it was before this increase, if it is worth as much.

We will now consider the excuse offered for not declaring any dividends. It seems that, when Throp sold out to Roberts, it was no serious detriment to the business to take out of it every dollar in money and all the notes, the latter amounting to over $100,000. The corporation was then thought to be worth after this stripping $120,000, one-half more than when it started, and upon that idea Lothrop bought his stock. By borrowing $1,000 the business was started anew the very next day after Roberts bought out Throp, and has flour-

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ished ever since, doing, according to one of the directors, the best and most profitable business it ever did in the years 1882, 1883, and 1884. Still, in the face of these facts as to the effect of this enormous division of profits in 1881 among the stockholders, then composed of the Roberts and Throp families, and their complete withdrawal from the business, it is now claimed and given in evidence by the directors that there has never been a day since when any dividend could be declared without serious detriment to the corporation, although in three years at least since that time the business has been more profitable than ever before. And yet the character of the business has not been materially changed. It is only claimed that it has been enlarged. The defendants' counsel admit the apparent net capital of $209,000 in 1887, but say that $173,000 of this represents notes taken for machines sold, called in the statements "bills receivable." They further say that it does not represent correctly the actual condition of the company for the following reasons:

"1. All the apparent surplus capital is tied up in bills receivable, taken in exchange for machines sold, and as such is subject to heavy shrinkage, not worth fifty cents on the dollar, very hard to collect.

"2. The other property of said corporation is invested in material, plant, fixtures, and machinery used in the business, and all subject to wear and tear, etc.

"3. For the reason that there were heavy losses which accrued in that and former years, amounting in the aggregate to $47,000, which had been carried forward with a hope of realizing something out of it, and was finally abandoned and charged off in 1888.

"4. While there may be nominal, there are not any actual, profits, and no one can tell whether there will be or not until the company's paper is collected, and the debts paid. There seems to be a surplus of unavailable assets, but an actual deficiency of money or anything that can be turned into money."

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During these years the statements show that in 1885 there was due, at the end of the year, from the First National Bank,—

	$16,864 55
Cash on hand in safe	529 82
Total	$17,394 37

In 1886:

Bank	$12,777 90
Safe	164 75
Total	$12,942 65

In 1887:

In bank	$2,375 73
Safe	20 32
Total	$2,396 05

In 1888:

In bank	$290 55
Safe	10 06
Total	$300 61

The statement in 1888 was made while this suit was in progress. Before 1885 there seems to be no account of money in bank, but each year there is shown a large amount of bills and accounts receivable. There was cash enough on hand in 1885 and 1886 to have made a very reasonable dividend upon the face value of the stock. There seems to have been no difficulty in collecting these bills receivable, so that the business was enlarged and kept in a flourishing condition. It is not to be presumed that they have allowed any of the notes to outlaw, and when the losses were charged off, after this suit was commenced, they amounted to only $47,000, and a large part of this was not from bills receivable, but the loss of goods in the Texas speculation upon corn-shellers. There is no doubt but there has been actual profits; and, even,

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conceding that the bills receivable, or time notes, will not realize any more than they did when Throp and Roberts divided up, they are still worth 70 cents on the dollar; and it must be remembered that the bills receivable on hand in 1888, after all losses are charged off, amount to over $150,000. Besides this, there are over $40,000 of accounts receivable, and over $80,000 of real estate, machinery, and merchandise on hand. The debts are $51,623.18, and the capital stock, $80,000. There is no reason why a dividend cannot be declared.

All the stockholders except this woman, and one other person, who has only 43 shares, are directors of the corporation or members of the Roberts family, with the exception of Bumphrey, the secretary, who holds 25 shares, and has been an active supporter of the past action of the company. If these men honestly think they cannot withdraw the amount of the dividends upon their stock without detriment or danger to the corporation, they can take the same in stock, and leave the money in the business. But the claim that the complainant cannot be given her proper dividend without damaging or deranging the financial condition of the corporation is nonsense. It is evident that these directors have not exercised a proper and reasonable discretion in this matter, and it is also apparent that they do not intend for some time to come, if ever, to declare any dividend. No hope is held out anywhere in their testimony that they can declare any in the future. But it is evident to my mind that they could have done so before this time from their own financial showing, and that the complainant is now entitled to one. If equity is powerless to protect this woman in her rights, then the directors of a corporation can do about as they please with the property which they have heretofore been supposed to hold as trustees for the stockholders, and the small stockholder

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is entirely at the mercy of the larger ones, who always control the management, and there is no relief. This is not equity, but oppression, sanctioned under and by the *forms* of the law.

The decree below ought to be reversed.

CAHILL, J. I agree with Mr. Justice MORSE in the result reached in this case. I find nothing in the record to justify the conclusion that a dividend cannot be declared on the stock without crippling the business of the corporation. The concern started in 1875, with a capital of $80,000 paid in. That sum constituted its entire resources, and with that sum it was able to start and carry on a successful business, so that in 1881 they were able to divide a handsome surplus among the stockholders without impairing the capital. In 1881 the concern again started out, and the record shows that from comparatively small beginnings the business has grown to great proportions. It may be that the corporation cannot reach out as fast and as far as its managers may wish in the way of extending and enlarging its business, and at the same time pay dividends to stockholders; but that it can carry on a business successfully to the extent it was doing when complainant's husband purchased his stock is substantially demonstrated by experience. I think complainant is entitled to a dividend.

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KOSCIUSKO P. PEET, ADMINISTRATOR, ETC., v. THE GREAT CAMP OF THE KNIGHTS OF THE MACCABEES OF THE WORLD FOR THE STATE OF MICHIGAN.

Mutual benefit associations—Assessment—Notice—Forfeiture of certificate—Action by administrator.

1. An objection that an administrator is not the proper person to bring suit upon a certificate of insurance in which the member to whom it is issued is the beneficiary should have no weight where the administrator is also the sole heir at law of the deceased, and entitled to the money due on the certificate. *Aveling v. Association*, 72 Mich. 7.
2. The finance keeper of a subordinate tent of a mutual benefit association, whose duty it was to notify members of assessments, failed to give such notice to a member, and also failed to notify the association of the names of the members in arrear therefor, and under the laws of the order the subordinate tent was suspended. No notice of such suspension was given to the member, who was in good standing except as to the payment of said assessment, nor did the constitution, by-laws, or rules of the order require the giving of such notice at the time the member received his certificate. Before the reinstatement of the subordinate tent, the member died, having taken no steps to relieve himself of the forfeiture worked by such suspension. And it is held that the member was not entitled to notice of such suspension, of which it was evidently intended he would take notice, it being presumed, and not unreasonably so, that he would know when his tent was suspended.

Error to Gratiot. (Hart, J.) Argued June 27, 1890. Decided November 14, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James L. Clark and *George P. Stone*, for appellant.

De Vere Hall, for defendant.

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MORSE, J. The defendant is a mutual benefit association, organizing tents or subordinate lodges in all places within the State, for moral, social, and intellectual advancement, and also for the purpose of establishing a benefit fund, from which, on satisfactory evidence of reaching 70 years of age, or of total or permanent disability, of a member who has complied with all of its requirements, or of his death without either of these events having transpired, a sum not exceeding $2,000 shall be paid him, or his widow, children, dependents, mother, father, sister, brother, or betrothed, as he may direct, and as the endowment laws provide. The organization proper is divided into three distinct branches: The Supreme Tent of the Knights of the Maccabees of the World, the jurisdiction of which is co-extensive with the world; the Great Camp of the State of Michigan; and the subordinate tents or local lodges, to which all members belong, and which are the life of the organization.

The Great Camp, the defendant in this action, is composed of certain officers and one representative from each subordinate tent in the State, selected yearly by such tents, and also of such persons as may have filled the office of great commander of the Great Camp of the State. The Great Camp has full and complete jurisdiction within this State over all subordinate tents. Its meetings are controlled by the representatives from these tents, selected yearly, who can amend the constitution and by-laws by a two-thirds vote. The subordinate tents are governed by its action in the regulation and control of its endowment fund, fixing the death-rate of assessments on the members of subordinate tents. It receives appeals and redresses grievances. It originates and regulates the means of its own support, and decides all questions arising out of its laws and by-laws.

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The plaintiff's intestate, Kosko R. Peet, became a member of Ithaca Tent No. 128, located at Ithaca, Gratiot county, October 8, 1885. He died September 25, 1888. When he joined the subordinate tent at Ithaca, he received two certificates in the following form except as to number, the second one being numbered 1,182:

"Incorporated by Special Act of the State Legislature.

"GREAT CAMP OF THE

"KNIGHTS OF THE MACCABEES OF THE WORLD

"No. 6,068. FOR THE STATE OF MICHIGAN. FIRST CLASS.

"RATE OF ASSESSMENT.

"Age 20. ENDOWMENT CERTIFICATE. $1.00.

"This certifies that Sir Knight Kosko R. Peet is a member of Ithaca Tent No. 128, located at Ithaca, Michigan, and that he is a beneficiary in good standing in the first class; that in accordance with, and under the provisions of, the laws governing the order, he is entitled to receive one assessment on the membership, but not over in amount one thousand dollars, as a benefit to himself, upon satisfactory proof of his death, and the surrender of this certificate, provided he shall have in every particular complied with all the rules and regulations of the order and of the first class, and in case of permanent or total disability, or upon reaching the age of seventy years, he will be entitled to receive annually thereafter one-tenth of said endowment, as provided in the laws of the order.

"In testimony whereof, the Great Camp has caused the great commander and great record keeper to attest and affix hereto the seal of the Great Camp of the Knights of the Maccabees of the World for Michigan, this eighth day of October, 1885.

[Seal of the Great Camp.]

"ROWLAND CONNOR, Gt. Com.

"N. S. BOYNTON, Gt. R. K.

"Countersigned, sealed, and delivered by the Sir Knight Commander and Sir Knight Record Keeper of Ithaca Tent No. 128, K. O. T. M. O. T. W., this 12th day of Oct., 1885.

[Seal of Ithaca Tent.]

"CHAS. J. PAINE, Sir Kt. Com.

"B. K. TODD, Sir Kt. R. K."

He left no will, and his father, Kosciusko P. Peet, was his sole heir at law. Administration was taken out upon his estate, and his father was appointed his administrator. He owed no debts except a trifling amount, which was paid out of moneys belonging to his estate.

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Notice was duly given of his death, and in the suit now here but three objections are raised to the payment of this sum of $2,000 evidenced by these certificates.

First, it is claimed that the administrator is not the proper person to bring the suit. It was upon this ground that the circuit judge directed a verdict. This is a technical objection, and should have had no weight, inasmuch as the person suing as administrator was the sole heir at law of deceased, and entitled to the whole fund, if any sum of money was found due from defendant. For a similar case in this Court, see *Aveling v. Association*, 72 Mich. 7. But if either one of the other objections is good, the court below was right in his direction of the verdict, and we shall therefore examine them.

Among the objects of the order as stated in its constitution is the following:

"Section 4, Art. 2: To establish a benefit fund or funds from which, on satisfactory evidence of the death, or on reaching 70 years of age, or total and permanent disability of a member of the order who has complied with all its lawful requirements, a sum not exceeding $2,000 shall be paid to the member, widow, children, dependents, mother, father, sister, brother, or betrothed of a member, as he may direct, and as the endowment laws provide."

This article was not in the constitution at the time deceased became a member, but was adopted in 1886. Section 6 of Article 1 of the endowment laws provides that

"No beneficiary or endowment certificate shall be made payable to any other person than the wife, children, dependents, father, mother, sister, brother, or betrothed of the member; nor can any such certificate be transferred or assigned by a member to any other person than the above, and no transfer or assignment of a certificate will be binding on this association unless the member shall make such change, as hereinafter provided. In case a member desires to change the beneficiary named in his

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certificate, he shall make a written request therefor, and deliver the same, with his certificate and the sum of fifty cents, to the record keeper of his tent. On receiving such written request, the record keeper shall forward the same to the great record keeper, who shall thereupon issue a new certificate. In case a member shall decease without having made direction as to payment, the same shall be paid to his legal heirs, each to receive such portion as he or she would receive under the laws of the State relating to the descent of personal property."

Kosko R. Peet died without any change in his certificates, and without making any direction as to whom they should be paid.

It is insisted by the counsel for the defendant that the time never arrived when the association was liable to pay the certificates; that when issued payable to the member himself as beneficiary, as was done, it is claimed, in this case, such certificate, under the section above quoted relating to the objects of the order, merely provides that the amount to be paid shall be one-tenth annually in case of permanent disability, or upon reaching 70 years of age, and that neither of these events has transpired; and that said certificates, therefore, never matured. The certificates do not so read, nor was such the law of the order, under any construction, when they were issued. It is contended by plaintiff's attorneys that subsequent action could not void or alter these certificates, which, as they claim, represent the contract of insurance then made, in connection with the laws of the order then existing. Without passing upon this latter contention, we are satisfied that the endowment laws and the constitution of the order, as they now stand, contemplate that, when the certificate runs to the member, as in this case, and he dies without any direction as to its payment, it can be collected by his legal heirs, especially when such heirs belong to the classes of persons to whom he might have directed it to be made payable.

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The last objection to plaintiff's recovery is that he was not a member in good standing of the defendant when he died, and had not complied with the rules, laws, and requirements of the order. The facts are not particularly in dispute, and are substantially as follows: The money to pay death or disability losses is obtained by the Great Camp by assessments upon the members of the subordinate tents. The mode of assessment is as follows: Each tent is required to collect from the members one death assessment, known as the "advance death assessment," and retain the same until called for by the Great Camp. When a loss occurs, and the Great Camp has not money enough in the endowment fund to pay it, a notice is sent to the subordinate tents, requiring them to forward to the Great Camp the assessment in their hands, and commanding them to collect from the members another advance assessment. In this case, on May 1, 1888, assessment No. 23 was called for, and assessment No. 24 ordered. The finance keeper of Ithaca Tent charged Peet with the amount due from him on assessment No. 24, which Peet paid May 31, 1888, balancing his account to that date. The finance keeper of said tent forwarded assessment No. 24, which was called for June 5, 1888. But on the same date assessment No. 25 was called for. The finance keeper did not charge Peet with this assessment upon the books, and never notified him in any way of the assessment. He also failed to notify the Great Camp of the members who failed to pay this assessment No. 25, as he should have done, and when the assessment was called for did not forward it to the Great Camp, and the Ithaca Tent was suspended. It is not shown that Peet had any notice of this suspension, but it is shown that there were no meetings, which were required to be monthly, of the Ithaca Tent from February 1, 1888, until

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October, 1888, when it was reinstated. This reinstatement was after Peet's death. It is admitted that the suspension of the tent was proper and legal, under the laws of the order. This suspension of the tent also suspends the members, unless, when in good standing at the time of such suspension, they shall apply to the great record keeper of the Great Camp, within 30 days from such suspension, for a special certificate. Obtaining such special certificate entitles them to the endowments (if they are endowment members), provided they pay the assessments to said great record keeper as they fall due, and provided they affiliate at the earliest practicable time with some tent. Peet did not do this, and therefore at the time of his death was a member of a suspended tent, and had not paid the assessments required of him under the laws of the order.

It is contended by the attorneys for plaintiff that this was through no fault of his; that he had paid all assessments required of which he received notice, and that, not being notified of the suspension of the tent, he was not required to apply for a special certificate; that the defendant's laws provide that the member—

"Shall pay his assessment to said finance keeper within 30 days from the date of the great record keeper's notice of such assessment so served."

That the service so mentioned is to be made upon blanks furnished by the great record keeper, and—

"By delivering the same to each endowment member personally, or by putting said notice into the post-office, properly inclosed in an envelope directed to such member at his place of residence, with postage prepaid."

That the defendant, not receiving from Ithaca Tent a return showing service of the notice of assessment No. 25 on plaintiff's intestate, was bound to know that it had

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not been served, and it became its duty to serve it, and that it also became the duty of the defendant, upon suspending the tent, to give Kosko R. Peet notice of the same, so that he might save his rights and benefits by paying his assessment and taking his special certificate; that the service of such notice was a necessary prerequisite to a legal forfeiture of the rights of said Peet. The following cases are cited in support of this contention: *Castner v. Insurance Co.*, 50 Mich. 273 (15 N. W. Rep. 452); *Baker v. Insurance Co.*, 51 Id. 243 (16 N. W. Rep. 391); *Bates v. Association*, Id. 587 (17 N. W. Rep. 67); *Miner v. Association*, 63 Id. 338 (29 N. W. Rep. 852). These cases do not apply. In each of them the notices of assessment were, by the laws of the company, to be served by the secretary of the company or association. None of them were associations of the character and kind of the defendant here.

The question arises, then, without any light from the holdings of our own Court, whether the due suspension of the tent, but without any fault upon the part of Peet, and without any notice to him, operated as a suspension as to him and a forfeiture of his rights. In this connection appears a resolution adopted by the Great Camp after the plaintiff's intestate became a member, and on August 10, 1886, at its annual meeting at Kalamazoo, at which meeting Ithaca Tent was represented by its duly-elected delegate, who took part in its proceedings. The resolution is as follows:

"*Resolved*, That the subordinate tent shall be the agent of its members in the transmission of all dues and assessments to the Great Camp, and the Great Camp will in no case be liable for any default or negligence on the part of a subordinate tent or its officers in such transmission, or the serving of notices of assessments or suspensions, required under the endowment laws of the order."

The counsel for plaintiff meet this resolution by saying

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that it was adopted after the plaintiff's intestate became a member, after his rights were fixed under the contract as first made; that it "added a new cause of forfeiture, and worked, to a certain extent, a radical change in the contract," which could not be done under the authority of *Becker v. Insurance Co.*, 48 Mich. 610. This case does not seem to be in point. We do not think the plaintiff's intestate was entitled to any notice of the suspension of the tent. The constitution, by-laws, and rules of the order, when he became a member, did not provide for any such notice to him from any source, and yet he would have been suspended unless he applied for the special certificate, and paid all assessments and dues, within 30 days from such suspension. It was evidently intended that he would take notice of such suspension. It was presumed, and not unreasonably so, that he would know when his tent was suspended. The resolution of August 10, 1886, as far as it applied to notices of suspension, did not add any additional burden to him, or impose any new forfeiture. Further than this it is not necessary to pass upon this resolution. It only made clear in this respect what was manifestly the intent of the laws of the association before its adoption.

It follows that the judgment of the lower court was right, and must be affirmed.

CHAMPLIN, C. J., and GRANT, J., concurred with MORSE, J.

CAHILL, J. I think the member was entitled to personal notice of his default before his membership could be forfeited for non-payment of dues.

LONG, J., did not sit.

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JAMES H. BROWN v. THE CITY OF GRAND RAPIDS.

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Municipal corporations—Taxation—Review of assessment—Estoppel.

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Where provision is made by law for a review of assessment proceedings, and a body is appointed with power to set the assessment aside or correct the error complained of, and an interested land-owner fails to appear before said body after due notice, or to take any steps to have such correction made, he is not in a condition to appeal to the courts for redress in the absence of fraud or bad faith; citing *Williams v. Saginaw*, 51 Mich. 120; *Comstock v. Grand Rapids*, 54 Id. 641; *Lumber Co. v. Crystal Falls*, 60 Id. 510.

Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued July 1, 1890. Decided November 14, 1890.

Bill to remove a cloud caused by the sale of complainant's land in satisfaction of a special assessment, etc. Defendant appeals. Reversed, and bill dismissed. The facts are stated in the opinion.

M. L. Dunham (*A. D. Cruickshank*, of counsel), for complainant, contended:

1. There was frand in making the district and in assessing the benefits, and for those reasons the assessment is void. The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the parties deny all intention of committing a fraud; citing *Kirby v. Ingersoll*, Har. Ch. 172.
2. Fraud is as properly made out by marshaling the circumstances surrounding the transaction, and deducing therefrom the fraudulent purpose, when it manifestly appears, as by presenting the most positive and direct testimony of actual purpose to deceive. Circumstantial proof in most cases can alone bring the fraud to light, for it is a wrong of secrecy and circumvention, and is to be found not in the open proclamation of the wrongdoer's purpose, but by the indication of covered tracks and

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studious concealment; citing *Hopkins v. Sievert*, 58 Mo. 201; Cooley, Torts, 475.

3. Whatever advantage a corporate officer takes of others because of his official position, which is unfair to others in the corporation, is a fraud; citing Cooley, Torts, 520; and fraud vitiates all acts, however solemn; citing Best, Ev. §§ 227, 595.

4. There was no legally ordained basis of apportionment of the award, and this burden was not spread over the taxing district according to any uniformly applied rule, and for these reasons the assessment is void; citing *Motz v. Detroit*, 18 Mich. 495; *Thomas v. Gain*, 35 Id. 154; *Clay v. Grand Rapids*, 60 Id. 452; *Detroit v. Daly*, 68 Id. 503; *White v. Saginaw*, 67 Id. 33; *Woodman v. Auditor General*, 52 Id. 30.

J. W Ransom (*Wm. Wisner Taylor*, of counsel), for defendant, contended:

1. That the Legislature may empower the common council to determine what property is benefited by the improvement, and determine the taxing district accordingly, cannot be doubted; citing *Hoyt v. East Saginaw*, 19 Mich. 39; *Warren v. Grand Haven*, 30 Id. 24; and the Legislature may authorize the apportionment of the assessment by commissioners after the district benefited has been defined by the common council; citing *Hoyt v. East Saginaw*, 19 Mich. 39.

2. Where the assessment is to be made upon a district benefited, and is left to the discretion of the municipal authorities, the exercise of the discretion to tax such district raises the presumption of benefits, and cannot be impeached in the absence of fraud; citing Welty, Assess. §§ 308, 309; *Cook v. Slocum*, 27 Minn. 513; *State v. Dist. Court*, 29 Id. 65; *Fagan v. Chicago*, 84 Ill. 231; *Brewster v. Davenport*, 51 Iowa, 427.

3. It is a matter of discretion with the governing power of the municipality to determine whether the property benefited shall bear the expense, or whether the cost of the improvement shall be made a public charge; and this discretion, when exercised, is not the subject of review by the courts. This proposition is supported by the authorities last cited.

4. Where the charter (or law) confers upon the city council power to determine upon the expediency or necessity of measures relating to local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such cases, the common council or governing body necessarily has, to a greater or less extent, a discretion as to the manner in which the power shall be used. In such case the decision of the

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proper corporate officer is, in the absence of fraud, final and conclusive, unless they transcend their powers; citing 1 Dill. Mun. Corp. (3d ed.) § 94; *Page v. St. Louis*, 20 Mo. 186.

5. No fraud whatever is shown in this case in the exercise of the power; nor can there be any pretense but that the common council acted within the scope of its powers in forming the district. But the complainant, by his bill, apparently asks the court to presume otherwise; to *presume* that the council acted fraudulently; to *presume* that it went beyond the scope of its powers in forming the district. There is no proof whatever to sustain the allegation of fraud in the bill, nothing to show that the council did not act with the utmost fairness. The presumption is the other way. Courts are bound to presume that a legislative body will exercise any discretion with which it is clothed properly, and that it had sufficient reason for doing an act the result of such discretion; citing 1 Dill. Mun. Corp. (3d ed.) § 94 (note 1); *Railroad Co. v. Mayor*, 1 Hilton, 562; *Gas Co. v. Des Moines*, 44 Iowa, 506.

6. Where by its charter a municipal corporation is empowered, if it deems the public welfare or convenience requires it, to open streets or make public improvements thereon, its determination, whether wise or unwise, cannot be judicially revised or corrected; citing 1 Dill. Mun. Corp. (3d ed.) § 95.

7. The fair and honest exercise of their judgment by the commissioners can result in no legal wrong to complainant. Even where an actual wrong is done, there is no remedy unless it be a legal wrong; and a legal wrong cannot arise from the exercise of a lawfully vested discretion, the exercise of which cannot be reviewed; citing *Sage v. Laurain*, 19 Mich. 137.

8. The duties of the commissioners in *spreading* an *assessment according to benefits* we submit are *quasi* judicial, and no action can be predicated upon an erroneous performance of these duties; citing *Bay County v. Brock*, 44 Mich. 45; and the presumption is that a public officer has faithfully and *correctly* performed his duty; citing *Clark v. Mowyer*, 5 Mich. 462, 484; *Peck v. Cavell*, 16 Id. 9; *Auditors v. Benoit*, 20 Id. 176; *Blair v. Compton*, 33 Id. 414; *Smith v. Rich*, 37 Id. 549; *Westbrook v. Miller*, 56 Id. 148.

9. Even where an assessor has omitted lands from his assessment roll, the presumption is that he has done his duty, and that they were properly omitted; citing *Perkins v. Nugent*, 45 Mich. 156; which presumption also applies where a demand is an essential prerequisite to a levy for a tax, it not appearing that demand was made before levy; citing *Wood v. Thomas*, 38 Mich. 686; and the presumption of performance of official duty

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supports the action of boards as well as of officers acting singly; citing *Upjohn v. Richland*, 46 Mich. 542.

10. The certificate of the commissioners annexed to the assessment roll in this case is full, and shows in detail the action of the commissioners in making the assessment, and that they proceeded in accordance with the provisions of law in spreading the assessment. This certificate is official, and therefore has all the weight, as evidence of the facts therein contained required to be certified, as the certificate of a supervisor to his roll of valuation. A supervisor's official certificate of valuation is legal evidence in *collateral* proceedings involving the validity of the tax, and cannot be contradicted by parol evidence; citing *Blanchard v. Powers*, 42 Mich. 619; and the supervisor's certificate of valuation attached to an assessment roll cannot be contradicted in any proceeding to enforce the tax; citing *Gamble v. East Saginaw*, 43 Mich. 367.

LONG, J. The complainant is the owner of lots 1, 3, 6, 8, 9, 10, and the west 54 feet of lot 11, of J. H. Brown's addition to the city of Grand Rapids. These lots were platted by complainant 66 feet wide by 165 feet deep, and are on the south side of Wealthy avenue, between Grandville avenue on the east and Oakland avenue on the west.

Wealthy avenue, between Grandville and Oakland avenues, up to June 7, 1886, was only 33 feet in width. At that date, the common council of the city of Grand Rapids adopted a resolution requesting the city surveyor to furnish it with a description of the property necessary to be taken to open and widen Wealthy avenue between Grandville and Oakland avenues to the width of 66 feet. Some time afterwards, and prior to August 2 following, the city surveyor filed his report with the city clerk, showing that it was necessary to take 33 feet off the north end of all of the property then lying on the south side of Wealthy avenue between Grandville and Oakland avenues. Proceedings were then taken by the city council up to and including the condemnation of this strip of land for said street, and an award was made by

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a jury of $8,805 to the property-owners therefor, of which amount the complainant was awarded $4,205.

On February 14, 1887, the common council appointed a committee consisting of three of the aldermen to locate a district upon which to assess the said $8,805, and a few days thereafter the committee made a report fixing the boundaries of such district, which report was adopted by the council. On November 28 following, the council adopted a resolution declaring that district to be the property benefited by the widening of such street, and to the extent of the award made by the jury to the property-owners, and that the entire of said sum be assessed upon the property within such assessment district. By said last resolution, the board of review and equalization of said city were directed to make an assessment of said sum in proportion to the benefits of each parcel of land therein by reason of such public improvement. The board completed such assessment, and on January 9, 1888, reported it to the council. The complainant was assessed for such benefits the sum of $2,447.25. January 16, 1888, was fixed as the day of hearing appeals from said assessment, and notice thereof was duly published as required by law. Several appeals were taken, and overruled by the council, and on January 23 said roll as made by the board of review was confirmed by the council.

The complainant did not appeal, but received and took the award made by the jury as his damages. Upon this strip of land taken from the complainant's premises were several buildings, which the complainant purchased from the city and moved back upon his lots off the line of the street. No complaint is made of the proceedings taken to condemn the property, or of the amount of the award for damages. The only questions raised relate to the making of the assessment district, and the amount assessed

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upon the property of complainant. Complainant refused to pay the taxes so assessed upon the several parcels of land owned by him, and the same were duly advertised and sold to the city of Grand Rapids for the amount of each assessment, and interest for such improvements. On October 23, 1888, complainant filed his bill to remove the cloud from the title, praying that the title to his lands be freed from any cloud by reason of such assessment and sale for such assessment. The court granted the relief prayed. The city appeals.

It is insisted by the complainant:

"1. That in making the assessment district the said common council intended to and did so make it as to cause an unjust and unfair proportion of said burden to be assessed upon that portion of said district lying south of said Wealthy avenue, and between Grandville avenue and Oakland avenue; that the motives and acts of said council in making the said district were unlawful and fraudulent.

"2. That the taxing district does not include all the property in the vicinity of and benefited by the improvement.

"3. That the board of review and equalization in spreading said sum of $8,805 acted arbitrarily, without an apportionment thereof, and without any basis or rule therefor.

"4. That said assessment roll did not contain the valuation of property in said district as made by said board of review, and that, in and by said roll, and all other proceedings in making said assessments against complainant's said lots, no such basis or rule was adopted that complainant is able to determine therefrom what amount he should pay according to the apportionment of said board of review.

"5. That the course pursued by the said board of review in making such assessments was wrong, illegal, and arbitrary, and aimed at the general purpose of compelling the complainant to pay more than his fair share of this assessment.

"6. That the amounts assessed upon the complainant's said lots do not bear any reasonable relation to the

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whole amount sought to be raised, nor to the amount assessed upon the land or property of others.

"7. That complainant's said lots were not benefited in such sums as were assessed thereon.

"8. That this proceeding, in effect, compels complainant to donate his property to the public use, without compensation therefor."

The charter of the city of Grand Rapids provides that the common council shall have full power to lay out, establish, open, extend, widen, straighten, alter, close, fill in or grade, vacate or abolish, any highway, etc., in said city whenever they shall deem it a necessary improvement, and that private property may be taken therefor, but the necessity for taking, and just compensation to be paid, shall be ascertained by 12 freeholders residing in said city. Proceedings were taken under the charter provisions, and the award of the jury was duly confirmed. An assessment district was fixed under resolution of the council as follows:

"All lots, parts of lots, and pieces of land included within the following described boundaries: Commencing at a point on the east line of the city of Grand Rapids, 100 feet north of the north line of Wealthy avenue, in said city; thence south on said east city line 266 feet; thence west, parallel with the south line of said Wealthy avenue, and distant 100 feet south therefrom, to a point 100 feet east at right angles from the easterly line of Grandville avenue; thence southerly, parallel with the street line last mentioned, to a point 132 feet south of the south line of Wealthy avenue; thence west, parallel with said line last mentioned, to the west line of King's addition to the city of Grand Rapids; thence south along said line, and said line produced, to a point 367 feet south of said Wealthy avenue, as opened and widened; thence west parallel with said Wealthy avenue, and said avenue extended, to the east bank of Grand river at low-water mark; thence northerly along said river bank at low-water mark to a point 100 feet north at right angles from the north line of said Wealthy avenue; thence east, parallel with said line last mentioned, to the place of

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beginning. Excepting therefrom all public streets and alleys, also the premises taken for such opening and widening."

The assessment district having been fixed and determined, the council by resolution directed the board of review and equalization of the city, who by the charter are constituted commissioners for that purpose, to make said assessment upon all the owners or occupants of lands and houses within the district aforesaid, in proportion, as nearly as may be, to the advantage which each should be deemed to acquire by the making of such public improvement, and that the commissioners meet for the purpose of making such assessment on Wednesday, November 30, 1887, at 10 o'clock in the forenoon, at the office of the city clerk. It appears that the commissioners did meet and make the assessment as directed by the resolution of the council. The roll so made by them was reported by the commissioners to the council on January 9, 1888, whereupon the council fixed January 16, 1888, as the time, and the council room in the city of Grand Rapids as the place, when and where it would hear appeals from said assessment roll, and gave notice thereof by publication in the Daily Democrat, a public newspaper of said city, and the designated official paper of the city at that time. The notice was giving in accordance with the charter provisions of the city, and no objection seems to be made to its sufficiency.

Section 8, title 6, of the charter provides that, upon the return being made and filed,—that is, the assessment roll made by the commissioners,—the clerk of the city shall cause notice of the names being returned to his office to be published in a newspaper of said city for such time as the council shall direct, and that the common council will, on such day as they shall appoint, proceed to hear any appeals from the said assessment, etc. The

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next section provides for a hearing before the council, and gives the council full power over the assessment, to either ratify and confirm the assessments made by the board of commissioners or to make corrections therein, or to wholly set aside the assessments, and order a new assessment to be made. It is not contended but that all these proceedings were duly taken, the notice published, and that the council met on the day appointed, heard appeals, and confirmed the report made by the commissioners. The complainant did not appear, and took no appeal from the assessment so made. Counsel claimed on the hearing in the court below that complainant had no notice of the time and place fixed by the council to hear appeals. But whether this be so or not, the time and place were fixed, and notice by publication given, as required by the charter, and it must be held sufficient notice. We are not satisfied, however, from the record that complainant did not have actual notice of the time and place to hear appeals.

He did not appear, and does not pretend that he made any effort to have the assessment corrected before the council. The determination of these two bodies, the commissioners who made the assessment roll, and the common council of the city of Grand Rapids, cannot now be inquired into, unless it appears that they acted in bad faith. It is not for this Court to set its judgment up in opposition to that of the board of commissioners and the council, and to say that this parcel of land or that is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the commissioners did not assess the complainant's lands in accordance with their best judgments. Where provision is made by law for a review of assessment proceedings, and a body appointed with the power

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to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body, or take any steps to have such correction made, he is not in a position to appeal to the courts for redress in the absence of fraud or bad faith. *Williams v. Saginaw,* 51 Mich. 120 (16 N. W. Rep. 260); *Comstock v. Grand Rapids,* 54 Id. 641 (20 N. W. Rep. 623); *Peninsula Iron & Lumber Co. v. Crystal Falls,* 60 Id. 510 (27 N. W. Rep. 666).

We need not discuss the other questions raised, as this must dispose of the case. The decree of the court below must be reversed, with costs of both courts, and decree entered here dismissing complainant's bill.

The other Justices concurred.

SARAH WRIGHT v. FRANK C. TREAT ET AL.

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Liquor traffic—Civil damage act—Pleading—Failure to demur—Bond—Liability of sureties—Contributory negligence.

1. A declaration in a civil damage case contained no *direct* allegation that the sale of liquor complained of was made to *intoxicated persons* or to those in the *habit of becoming intoxicated,* but did charge that the defendant sold certain persons liquor, and that, by reason thereof, he, in an *unlawful* manner, caused them to become greatly intoxicated. And it is held that, if the declaration was defective for want of such allegation, the defendants should have raised the objection by demurrer, and that, as the proofs tended to show the sale of liquor to the persons named *when intoxicated,* the declaration should have been amended to correspond with the proofs, which amendment will be considered as so made in furtherance of justice, and in support of the verdict and judgment.[1]

[1] See *Johnson v. Spear,* 82 Mich. 454 (head-note 3).

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2. The sureties upon a liquor bond which has been approved and filed by the county treasurer remain liable for any breach committed by the principal within the year for which the bond was so filed, and cannot discharge themselves from liability by removing from the limits of the corporation within which the business is carried on, nor will they be so relieved by notice from the county treasurer to the principal to file a new bond, and in the meantime to desist from the prosecution of his business.

3. In a suit by a wife to recover from a liquor dealer and his sureties damages for injuries sustained by her by being thrown from a carriage, in which she was riding with her husband, by reason of its being overturned through the negligence of intoxicated persons, the contributory negligence of the husband, if any, does not enter into the issue, the cause of action being statutory, and not in any manner based upon the negligence of the injured party; citing *Flower v. Witkovsky*, 69 Mich. 371; *Brockway v. Patterson*, 72 Id. 122.

Error to Barry. (Hooker, J.) Argued October 10, 1890. Decided November 14, 1890.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

Smith & Colgrove, for appellants.

F. M. Woodmansee and *Shriner & Fox*, for plaintiff.

CHAMPLIN, C. J. Treat is a principal, and Brady and Clever are sureties, in a so-called liquor bond, and this action is brought against them to recover damages for an alleged breach of such bond.

The declaration alleges that from, on, or about May 2, 1887, Treat was engaged in and carried on the business and occupation of selling at retail intoxicating liquors, and, to enable him to engage in such business, gave the bond in question.

The plaintiff further alleges that on or about September 3, 1887, as she was riding with her husband in a car-

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riage along the public highway, they met a horse and buggy, in which buggy were Elzey Wells and James Shafer. Shafer was driving the horse. They were proceeding at a rapid rate, and conducting themselves in a boisterous manner. The team after which plaintiff was riding was on the point of leaving a bridge, when Mr. Wright saw the buggy approaching, and hallooed to the occupants, but they paid no attention, and drove their horse violently against the team of Mr. Wright, and, by means of the collision, the wagon in which Wright and his wife were riding was overturned, and the occupants thrown out and Mrs. Wright severely injured. The declaration further alleges that Treat, being engaged in the business of selling intoxicating liquors, did on September 3, 1887, at the village of Nashville, by himself, servants, etc., sell, give, and furnish to Wells and Shafer large quantities of intoxicating liquors, and did thereby, and by reason thereof, and in a wanton, gross, and unlawful manner, cause the said Elzey Wells and James Shafer to become greatly intoxicated; that, being so intoxicated, they drove towards the village of Vermontville, in Eaton county, upon the public highway, and by reason of their drunken condition, aforesaid, caused their horse to collide with great force against the wagon of the plaintiff, causing the injury aforesaid.

Defendants pleaded the general issue, and gave notice of special matter of defense, which will be noticed further on.

Upon the trial of the case, Treat was sworn as a witness, and, while he denies selling or furnishing any liquor to Wells and Shafer, he admits that he saw Shafer on the day of the collision, and says that he was somewhat intoxicated, and that he formed that opinion at the time. Wells and Shafer both testify positively to obtaining liquor of Treat, and to drinking it in Treat's place of

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business. Their testimony also tends to show that they were in an intoxicated condition.

After the introduction of the testimony at the trial, the defendants' counsel requested the court to instruct the jury that, in order to entitle the plaintiff to recover, she must allege in her declaration, and sustain such allegation by proof, that Wells and Shafer were, at the time of the alleged sale to them by Treat, either persons who were intoxicated or were persons who were in the habit of getting intoxicated, and that in this case there is no such allegation, and no such proof, and the verdict must be for the defendants; and the refusal of the court to give such instructions is alleged as error.

Under the testimony before referred to, the defendants were not entitled to the charge that there was no proof that Wells and Shafer were intoxicated at the time of the alleged sale of liquor to them by Treat, and they were not entitled to have the instruction given as requested. We find no direct allegation in the declaration that the sale to Wells and Shafer was a sale to persons who were intoxicated, or who were in the habit of becoming intoxicated, but it does state that Treat sold them a large quantity of intoxicating liquors, and that, by reason thereof, he, in an unlawful manner, caused them to become greatly intoxicated. The declaration was not demurred to, and, if the point is well taken that the declaration is defective in that respect, the defendants should have demurred, instead of waiting until all the proofs were introduced in the case before raising the point, and, as the proofs tended to show the sale of liquor to these intoxicated persons, the declaration might and ought to have been amended to correspond with the proofs; but where the defendants have not taken advantage of the point by demurrer, or until after the expenses

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of the trial have been incurred, the declaration will be treated as having been amended in furtherance of justice, and in support of the verdict and judgment.

Another point raised by the defense is that one of the defendants, Henry Clever, after he had become surety upon the bond, and after it had been accepted and filed with the county treasurer, and after Treat had been engaged in the business of a saloonist, removed from the village of Nashville, which is a corporation carved out of the township of Maple Grove, and went to reside in the township of Maple Grove, and has there ever since remained; that, upon his removal from the corporation, the county treasurer gave notice, in writing, to Treat that he must file a new bond, and that Treat closed his saloon, and the same was closed and shut up for the space of ten days and upwards, and was then opened without filing a new bond, and no new bond was ever filed as demanded by the county treasurer; that at the time of the alleged sale to Wells and Shafer, set forth in plaintiff's declaration, defendant Clever was a resident of Maple Grove, outside of the village of Nashville, and had been for the space of three months and upwards; and that by reason of such facts the defendant Clever was not liable upon said bond for the cause complained of. These facts were set up in the special notice of defense, and when the proof to sustain this special defense was offered it was excluded by the court as irrelevant to the issue. Error is assigned upon such ruling.

We think the court was correct. After the bond required by the statute has been executed, approved, and filed with the county treasurer, the sureties upon such bond remain liable for any breach thereof committed by the principal during the year for which the bond was filed, and a surety cannot discharge himself from liability

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by simply removing from the corporation limits; neither is he relieved from liability because the county treasurer notifies the principal to file a new bond, and to desist from carrying on the business in the meantime. *Brockway v. Petted,* 79 Mich. 620.

The charge of the court that referred to the contributory negligence of the husband, if any, was more favorable to the defendants than they were entitled to. We do not think this is a case where the contributory negligence of the husband, if he was negligent, enters into the issue. The cause of action is statutory, and is not in any manner based upon the negligence of the injured party. *Flower v. Witkovsky,* 69 Mich. 371 (37 N. W. Rep. 364); *Brockway v. Patterson,* 72 Id. 122 (40 N. W. Rep. 192). The proof in this case was conclusive that Wells and Shafer were in a state of beastly intoxication at the time they drove their horse against the vehicle in which the plaintiff was riding, and, if defendant Treat sold or furnished the liquor to these persons while they were intoxicated, the sureties upon the bond must answer for any damages occasioned by the wrongful act of these parties while intoxicated.

We find no error in the record, and the judgment must be affirmed.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

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s47 NW	239
131	s318
83	116
s47 NW	239
132	s138
83	116
134	s193

DAVID HIRSHFIELD v. CORDELIA WALDRON.

Married women—Liability for purchase of goods—Evidence—Practice in circuit court.

1. A statement by a purchaser of goods to the vendor, "You may charge them to me," is equivalent to saying, "You may charge them to me *individually*."

2. Suit was brought against a married woman to recover for goods claimed to have been purchased by her on her *individual* credit, which was denied by the defendant; and the following questions put to the plaintiff are held proper, as calling for testimony tending to show that the credit was extended to the wife, namely:

   a—If prior to such sale he had not attempted to collect a claim of long standing of the husband.

   b—Whether he would have charged the goods to the husband if requested to do so by the wife.

   c—Whether the claim which he had attempted to collect was not litigated in the same court in which the trial was being had, and the case taken to the Supreme Court.

   d—Also the following question, asked of the wife, namely: Whether it was not a fact that, about the time of the purchase of the goods, her husband "wasn't paying anybody."

3. Counsel for plaintiff, in closing the case to the jury, assumed to state what took place on the trial of the case in justice's court, and the defendant's counsel asked that the return of the justice be admitted in evidence to contradict such statement. And it is held that the return was properly excluded, the assertion of counsel being no evidence of the proceedings before the justice, which were irrelevant, and ought not to have been referred to.

4. It is not error for the court to order counsel to desist from commenting in their argument to the jury upon alleged entries in books of account which, though inquired about on cross-examination, are not made evidence by the introduction of the books.

5. A married woman is liable for the price of clothing purchased by her for a minor son, and charged to her by her direction, she agreeing to pay for the same. *Buck v. Haynes Estate*, 75 Mich. 397 (head-note 2); *Fafeyta v. McGoldrick*, 79 Id. 360.

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Error to Muskegon. (Dickerman, J.) Argued October 10, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

De Long & O'Hara, for appellant, contended:

1. The request conformed to the law as laid down in *Powers v. Russell,* 26 Mich. 179, and should have been given as presented.
2. It was the duty of the husband to procure necessary clothing for this minor son, and not that of the defendant; citing *Howe v. North,* 69 Mich. 284.
3. Even if defendant told plaintiff, which is not conceded, to charge the goods to her, and she would be in in a day or two and pay for them, she did no more than most married women do in purchasing family goods, never dreaming of becoming *individually* liable to pay for them.

H. L. Delano, for plaintiff.

CHAMPLIN, C. J. On November 29, 1884, the plaintiff had a clothing store in the city of Muskegon. On that day, the defendant, who was a married woman living with her husband, came into his place of business with their only son, and picked out a coat and vest for the boy. She wanted an entire suit of clothes, but plaintiff did not have in stock any pants of the right size. The price of the coat and vest was $15.50.

The plaintiff claimed on the trial that he had known the defendant for a number of years before that time, and knew that she was the wife of L. A. Waldron, and that she was living with him at that time, and that the boy was the only son of defendant and her husband, and that the coat and vest were for the boy, Leonard, Jr. Plaintiff testified in his own behalf in the court below that when Mrs. Waldron came into the store and picked out the suit of clothes, and ascertained the price, she purchased the coat and vest, and told him to charge them to her, and she would pay it in a day or two, or within

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a few days, and that he did make the charge against her upon his blotter at that time. Upon cross-examination he was asked to repeat the language which she made use of, and he said that Mrs. Waldron said: "Charge it to me, and I will come in and pay it to you in a day or two." Upon further interrogation he testified that she did not say, "Charge it to me individually," but, "Charge it to me."

Mrs. Waldron was a witness in her own behalf, and testified to purchasing the goods at plaintiff's store, and further testified as follows:

"My son wanted a suit of clothes, and I went to Mr. Waldron and asked him where I should go to get them, and he said: 'Mr. Hirshfield is owing me,' and I said I would go into Mr. Hirshfield's and get them, and I went into Hirshfield's and got them, and there wasn't anything said about charging them. I never told him to charge them to me or anybody else, and I took the clothes and went home. I never heard anything about it again until 1888, I think. In the mean time he had asked Mr. Waldron for it several times.

"*Mr. Delano.* I object to that.

"*Q.* You were not present?

"*A.* I was not.

"*The Court.* Well, I think that had better go out then.

"*A.* And that is all I know about it. I don't know anything more about it. When I went into the store afterwards, I think it was just before he sued me, I went into the store, and had a talk with him. And I said, 'Mr. Hirshfield, you know that I didn't tell you to charge those goods to me.' And he said 'I know you didn't, and that is just the reason I am going to collect it of you.' At the time I got the clothes I had not one cent in my own name, and I never had gone to any store in this town and had anything charged to me. And that's all I know about it."

The plaintiff also produced the blotter upon which the charge was made, and was cross-examined by the defendant's counsel as to that entry, and from his questioning,

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and the position of the "Mrs." prefixed to Mrs. Waldron's name, he sought to show by the witness that that prefix was written after the original charge was made. It appears from the testimony that the prefix "Mrs." was in the margin of the book made by the red lines. Plaintiff was asked to show other entries where charges were partially in the margin, and he pointed out several.

At the conclusion of the testimony, the defendant's attorney requested the court to instruct the jury as follows:

"Before you can find for the plaintiff, you must be satisfied from the evidence, and that by a fair preponderance, that Mrs. Waldron told plaintiff to charge the goods to her *individually*, and that she would pay for them, and that plaintiff gave her the credit at the time. It is not sufficient that she got the goods from Hirshfield unless she ordered them charged as I have before stated."

And the court immediately proceeded to instruct the jury substantially in accordance with the request in the following language:

"Gentlemen, there is one request that has been handed up which I will give you. Before you can find for plaintiff you must be satisfied from the evidence, and by a fair preponderance of it, that Mrs. Waldron told plaintiff to charge the goods to her, and that she would pay for them, and that plaintiff gave her the credit at the time. It is not sufficient that she got the goods from Hirshfield unless she ordered them charged as I have before stated."

He further instructed the jury as follows:

"Gentlemen, that is all the point there is in this case. There is no dispute but what the goods were obtained, and that Mrs. Waldron got them, and for her son, who was with her. It is simply a question of whether she told Mr. Hirshfield then to charge the goods to her, and that she would pay for them, as he says she did, or whether she did not, as she claims she did not. Now it is for you to weigh all this evidence upon that point. It

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was competent for her, although she was a married woman, to go in there and buy goods in that way for her son; and if she told him to charge the goods to her, and that she would be in in a day or two to pay for them, she would be bound to pay for them in law. If she did not, but simply went in and got the goods, and said, 'Charge them,' why then she would not."

The defendant's attorneys have assigned error upon the refusal of the court to charge the jury in the language of their request. We fail to perceive the force of the distinction between the statement made by such person purchasing goods,—"You may charge it to me," or "You may charge it to me individually."

Defendant's counsel alleged as error the following question put to the witness Hirshfield:

"Prior to this time, you had undertaken to collect a claim against Waldron that had been standing for some years, hadn't you?"

We see no error in permitting this question to be asked and answered. It was material to show that the credit was not extended to the husband, but to the wife, and this testimony would have some bearing in that direction.

The second assignment of error relates to the ruling of the court in permitting the following question:

"Now, if Mrs. Waldron had asked you to charge this coat and vest to her husband, L. A. Waldron, would you have done it?"

And the third assignment of error may be said in this respect to be the same as the last, and related to the following question:

"That claim that you speak of that you tried to collect of him was litigated in this court, and taken to the Supreme Court, wasn't it?"

We think this was relevant. The testimony tends to explain the relation of the parties, and to substantiate

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the testimony of the plaintiff that he did not extend the credit to Mr. Waldron.

The fourth assignment of error relates to the ruling of the court in permitting the following question to be asked defendant on her cross-examination:

"Now, about that time, your husband, Waldron, wasn't paying anybody, was he?"

There was no error in this ruling. It was a relevant fact to be shown that the husband was so circumstanced that he was not providing for the wants and necessities of the family, and also as tending to show the fact that the goods at the time were not charged to the husband, but to the wife.

The fifth assignment of error is based upon the refusal to receive the return of the justice in evidence when the counsel for plaintiff was summing up the case to the jury, and was stating what took place in justice's court upon the trial of the case there. We think there was no error in refusing to receive the return of the justice for the purpose of contradicting the statement of counsel. What the counsel said was not testimony in the case, and his assertion of what took place in the court below was no evidence of the fact. Counsel for the defendant's assertion to the contrary would be just as effective as that of the counsel for the plaintiff on that point. It was irrelevant matter, which ought not to have been referred to, but we do not see that it prejudiced defendant's case, as it was stated on all hands that she was not present at the trial in the court below.

The bill of exceptions states that the counsel for the defendant, in summing up the facts to the jury, commented upon an item contained in the blotter of plaintiff of a charge against Jake Hetz, in which a part of his name was entered in the margin outside of the red line,

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and was written partly in pencil, as claimed by counsel in his argument. The plaintiff's counsel objected—

"To such comment, stating that there was nothing in the record warranting any commenting to be made in reference to this item."

The court stopped counsel in his argument to the jury, and counsel stated that the witness' attention had been called to the other items, and he thought his comments were legitimate as attacking the good faith of the plaintiff. The court sustained the objection of plaintiff's counsel, and ordered defendant's counsel to desist from further comments on the Jake Hetz item, and other items that had not been offered in evidence, to which ruling the defendant by her counsel excepted, and this exception forms the basis of the sixth assignment of error. The testimony, with reference to this and other items, was drawn out by defendant's counsel upon cross-examination, and it does not appear from the record that the book containing these items was offered in evidence; nor does it appear from the testimony that a portion of the charge against Jake Hetz was written in pencil. We think there was no error in the action of the court with respect to these items.

The charge of the court was in harmony with our rulings as to the liberty of married women to purchase goods upon their own credit and promise to pay therefor. *Powers v. Russell,* 26 Mich. 179; *Campbell v. White,* 22 Id. 178; *Tillman v. Shackleton,* 15 Id. 447.

The judgment must be affirmed.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

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ERASTUS J. HORTON v. GEORGE E. HUBBARD ET AL. 83 123 93 303

Land contract—Specific performance—Parties—Execution levy.

1. The right of a vendee to the specific performance of a land contract cannot be cut off by *fraudulent* attachment levies, nor by the levy of a *valid* attachment or execution against the vendor *after* the date of the contract.
2. Equity, having once taken jurisdiction to enforce the specific performance of a land contract, will retain it to adjust the conflicting claims to the purchase money, which the vendee will be decreed to bring into court for the party entitled to it; citing *Thurston v. Prentiss*, 1 Mich. 198; *Hanchett v. McQueen*, 32 Id. 25; *Stevenson v. Jackson*, 40 Id. 702.
3. An attachment or execution creditor is a *proper* party to a bill to enforce the specific performance of a land contract, for at most he stands in the place of the vendor, and is bound by his duty, if he claims his interest in the land; citing *Morris v. Hoyt*, 11 Mich. 17; *Daily v. Litchfield*, 10 Id. 36; *Woodward v. Clark*, 15 Id. 104; *Rogers v. Odell*, 36 Id. 411; *Chapman v. Morgan*, 55 Id. 126.

Appeal from Kent. (Burch, J.) Argued October 10 and 13, 1890. Decided November 14, 1890.

Bill for specific performance of land contract. Complainant appeals. Decree reversed, and case remanded. The facts are stated in the opinion.

Birney Hoyt, for complainant, contended:

1. A bill is not multifarious unless disconnected and independent causes of action are brought upon the record; citing *Wales v. Newbould*, 9 Mich. 58; and a primary rule of equity pleading requires that all persons should be made parties who are interested in the subject-matter; citing Id. 59.
2. When the subject-matter of the litigation is *entire* in itself, it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up in the bill; citing *Ingersoll v. Kirby*, Walk. Ch. 69.

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3. It is a general rule in specific performance cases that all persons who have acquired any interest in the lands from the vendor subsequent to the contract are proper parties, and usually they are necessary parties; citing *Daily v. Litchfield*, 10 Mich. 36; *Moris v. Hoyt*, 11 Id. 17; *Woodward v. Clark*, 15 Id. 104; *Covell v. Cole*, 16 Id. 225; *Bird v. Hall*, 30 Id. 374; *Berry v. Innes*, 35 Id. 189, 46 Id. 518; *Rogers v. Odell*, 36 Id. 411; *Stevenson v. Jackson*, 40 Id. 702; *Baldwin v. Fletcher*, 48 Id. 604; *Gamble v. Folsom*, 49 Id. 141; *Farfield v. Barbour*, 51 Id. 62; *Gardner v. Warren*, 52 Id. 309; *Chapman v. Morgan*, 55 Id. 126; *Taft v. Taft*, 73 Id. 502.

4. In such a case the interests of other persons in the land who are not immediately connected with the contract, or title of the complainant, may be ascertained, and a decree made holding them subject to complainant's rights or paramount thereto, and such disputed claims as to rights in the land between such persons when made defendants may be settled upon the pleadings between complainant and the defendants; citing *Thurston v. Prentiss*, 1 Mich. 198; *Page v. Webster*, 8 Id. 264; *Cummings v. Freer*, 26 Id. 134; *Hanchett v. McQueen*, 32 Id. 25; *Bonker v. Charlesworth*, 33 Id. 81; *Lawrence v. Jarvis*, 36 Id. 282; *Seminary v. Kiefer*, 43 Id. 111; *Rogers v. Blackwell*, 49 Id. 192.

5. The bill charges that the attachment was a fraudulent contrivance to prevent the delivery of the deed mentioned in the bill, and a general allegation of fraud is sufficient; citing *Tong v. Marvin*, 15 Mich. 60; *Reeg v. Burnham*, 55 Id. 53; as is an offer to pay the consideration of the contract; citing *Morris v. Hoyt*, 11 Mich. 18; and the decree may require that the unpaid money be brought into court; citing *Stevenson v. Jackson*, 40 Mich. 702, 705.

Edwin F. Sweet and *Willis B. Perkins*, for defendant McConnell, contended:

1. The bill has a five-fold aspect.
   a—To remove cloud from title.
   b—To confirm a deed.
   c—For specific performance.
   d—To obtain possession of a deed.
   e—To restrain by injunction the return of the deed to the grantors, and the sale or incumbering of the property by them.
   —Each of which separate causes is supported by appropriate allegations, and followed by an appropriate prayer for relief.

2. The respective theories of the bill clearly destroy each other. The different grounds are wholly distinct, and each ground alleged is sufficient as stated to sustain a bill, and the bill is

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therefore multifarious; citing Story, Eq. Pl. (8th ed.) § 271*b*.

3. A bill framed with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint which destroy each other; citing *Hart v. McKeen*, Walk. Ch. 417; *Winslow v. Jenness*, 64 Mich. 84.

4. To ask alternate relief is proper enough, but to grant it must not result in complete destruction of, or be in opposition to, the other prayer and the allegations on which it is founded; citing *Ingersoll v. Kirby*, Walk. Ch. 65; *Wales v. Newbould*, 9 Mich. 45; *Hunton v. Platt*, 11 Id. 264; *Taylor v. King*, 32 Id. 42; *Woodruff v. Young*, 43 Id. 548.

5. It has been held that a bill filed for the two-fold purpose of foreclosing a mortgage and removing a cloud from the title is bad for misjoinder and for multifariousness; citing *Chamberlain v. Lyell*, 3 Mich. 448; *Horton v. Ingersoll*, 13 Id. 409; *Bank v. Bronson*, 14 Id. 361; *Wilkinson v. Green*, 34 Id. 221; *McClure v. Holbrook*, 39 Id. 42.

CAHILL, J. On March 1, 1889, the complainant filed his bill in the circuit court of the county of Kent for the specific performance of a land contract. On May 27, by leave of the court, he filed an amended bill, praying that a contract between himself and the defendants George E. Hubbard and Christiana A. Hubbard, by which they had agreed to convey to him lot 17, block 5, in Ellsworth's addition to the city of Grand Rapids, for the sum of $1,950, be specifically performed.

The facts set out in the bill are substantially as follows: That on January 5, 1889, Christiana A. Hubbard, the wife of George E. Hubbard, was the owner of the property in question; that her husband, acting for her, and by her authority, entered into a contract with the complainant by which he agreed to sell and convey to him the lot in question for $1,950. Complainant was to assume a mortgage on the lot, pay some back taxes, and the balance he was to pay in money. In performance of this agreement, a deed was drawn up and executed by the Hubbards, and sent to the Old National Bank of Grand Rapids, for delivery to the complainant upon his

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payment of the amount that was due in money. Upon an inspection of the deed by the complainant, it appeared that it had been executed by George E. Hubbard in Arizona, and that there was no clerk's certificate attached showing that it had been executed according to the laws of that territory. The complainant declined to accept the deed in that form, and it was sent to Arizona for the purpose of having a certificate attached. The bill shows that the contract made by George E. Hubbard with complainant was acquiesced in and ratified by his wife, who joined in the deed. In a few days the deed was returned to the Old National Bank perfected.

In the mean time, and after the deed had been first received at the bank, and before its return from Arizona, the defendant McConnell had commenced an attachment suit against George E. Hubbard, and levied upon the land in question, so that, when complainant called at the bank to close up the trade, he found this levy as a cloud upon the title. He called upon the defendants Hubbard to remove this cloud, and perform the contract, by delivering him the deed of the property. This they were unwilling or unable to do. Upon this point the bill states:

"And your orator further shows that, after said Christiana A. Hubbard had heard of the said levy of attachment by said John McConnell, the said Christiana A. Hubbard signed and made the following direction and instrument, and sent the same to Harvey J. Hollister, or to your orator, to be delivered to said Harvey J. Hollister, viz.:

"'GRAND RAPIDS, MICH., Feb. 12, 1889.

"'H. J. HOLLISTER:

'"Please hold deed and papers from George E. Hubbard to E. J. Horton until records are satisfactorily fixed up.

"'MRS. GEORGE E. HUBBARD.

"'*Grand Haven, Mich.*,' Feb'y 12, 1889.'

"And on or about the 27th day of February, 1889, the said Christiana A. Hubbard sent to Harvey J. Hollister a communication as follows, viz.:

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"'GRAND HAVEN, MICH., Feb. 27, '89.

"'MR. H. J. HOLLISTER, Grand Rapids, Mich.:

"'*Dear Sir:* Please return to me at once the deed I sent you, and oblige,

"'Yours resp'ty,

"'MRS. GEO. E. HUBBARD.'

"And on or about the 1st day of March, A. D. 1889, the said Christiana A. Hubbard wrote, signed, and sent to your orator a letter as follows, which was received by him soon after being sent, viz.:

"'GRAND HAVEN, MICH., March 1, 1889.

"'MR. E. J. HORTON,

"'Grand Rapids, Mich.

"'*Dear Sir:* I don't think there is any need of your making trouble about the lot. I have not received any other deed, and should I receive one I will not sign it; but I don't think I will receive one. I think there is some mistake about it. I know Mr. Hubbard wants to do what is right, and I know he will do right by you. He is so far away, and I do not want to get into any trouble. I have written him to-day, and I know he will do what is right. If you will wait until he can be heard from, I am sure it will be all settled satisfactory to you. I know it will be all right, and I promise you I will not sign any deed should one come. I am here alone, and I do not want trouble, and I know there is some mistake, and it will be all right, if you will wait until we can hear from him.

"'Very resp'y yours,

"'MRS. GEO. E. HUBBARD.'

"And your orator further shows, on information and belief, that said George E. Hubbard and Christiana A. Hubbard have abandoned the said contract, and have refused to perform the same, and said Christiana A. Hubbard has instructed and required the said bank, or its cashier, to return the said deed to her, with the avowed purpose of destroying the said deed, and refusing to perform said contract.

"And your orator is informed by the officers of said bank that, in pursuance of said instructions, said bank, or its cashier, will send said deed to said Christiana A. Hubbard; and your orator fears and apprehends that said bank, or its cashier, will send said deed to her, and that she, or said George E. Hubbard, will destoy the same, unless restrained by the injunction of this court.

"And your orator further show that said premises are not free from incumbrances, as appears by the record in the office of said register of deeds; that said alleged attachment levy is still of record in the said office, and no insurance policy on the houses on said land has ever been sent or delivered to your orator.

"And your orator further shows that said attachment levy is void, and is a gross fraud upon your orator, and that said John McConnell, before said attachment levy was made, or suit com-

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menced, had notice that said land had been purchased by your orator of said George E. Hubbard and Christiana A. Hubbard, and that your orator then had said deed in his hands, and said deed was shown to the attorney for said John McConnell, who made the affidavit for him for the said attachment, before such affidavit was made.

"And your orator charges that said John McConnell has conspired with certain parties unknown to your orator to prevent your orator's obtaining the said deed after being properly certified, and to obtain the said land for himself.

"And your orator charges on information and belief that said George E. Hubbard is not and was not indebted to said John McConnell in any sum, and that said George E. Hubbard was not a non-resident of this State, and that no cause for said attachment existed, and that your orator's right to said land is prior to said alleged attachment levy.

"But your orator charges that the said levy, being so filed, raises a cloud upon the title to said land, and greatly depreciates the value thereof, and makes the same unsalable."

The prayer of the bill is as follows:

1. That the contract for the purchase of said premises may be specifically performed, and that the Hubbards be required to convey such lands to the complainant discharged of such levy.

2. That the attachment levy may be discharged.

3. If the levy is of any force, as found by the court, for any amount, that the same may be ascertained, and paid out of the balance of the consideration due from the complainant, and the levy discharged.

4. That the deed before executed, and on deposit in the Old National Bank, be delivered to complainant.

5. That the court may decree that the said deed was delivered to complainant before said levy, and that complainant is the owner of the land, and that the levy is wholly void.

6. That the deed from the Hubbards be produced and placed upon record, and that they be restrained by injunction from receiving the said deed, now with Harvey J. Hollister, cashier, and from making or executing any deed or conveyance of said land, or incumbering the same, and that the Old National Bank, and Hollister, its cashier, be restrained from returning said deed to said parties or delivering it to any person other than your orator, and for general relief.

The defendants Hubbard answered. Defendant McCon-

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nell demurred to the bill, generally, for want of equity, and, specially, that the bill was multifarious. The Old National Bank and Hollister, defendants, did not appear. The demurrer of defendant McConnell was sustained in the circuit, and the bill dismissed as to him. Complainant appeals.

I think the demurrer should have been overruled. Although the bill prays for certain relief to which complainant is not entitled, still it makes a plain case for equitable relief. Complainant, having entered into a contract with the Hubbards for the purchase of the land in question, upon the terms set out in the bill, is entitled to have such contract specifically performed, unless there is some obstacle in the way of such performance, which the court, in the exercise of its equity jurisdiction, cannot surmount. The only obstacle to such performance is the levy of defendant McConnell. But the bill alleges that McConnell, before commencing his suit, or making his levy, knew that complainant had purchased the land of Mrs. Hubbard, who was the owner of the land; that the attachment was against George E. Hubbard, but that he was not indebted to McConnell, and that no cause for the attachment existed; that the attachment levy is void, and a fraud upon complainant; that McConnell has conspired with certain persons unknown to complainant to prevent complainant from obtaining a deed of the land purchased by him. These facts being admitted by the demurrer to be true, the attachment levy does not stand in the way of a decree for the specific performance of the contract by the Hubbards. The right that a purchaser of land under a contract has to have the contract performed would not be very valuable if the remedy to enforce it could be cut off by fraudulent attachment levies. If the attachment is in good faith, and is prosecuted to

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judgment against George E. Hubbard, it can only reach his interest in the land, which appears by the bill to be nothing. But the specific performance of a land contract, at the suit of the vendee, cannot be prevented by the levy of a valid attachment or execution, after the date of the contract, against the vendor.

Equity has jurisdiction in such cases, and, having once taken jurisdiction to enforce the contract, will retain it to adjust the conflicting claims to the purchase money due from the vendee. The vendee will be decreed to bring his money into court for the party entitled to it. *Stevenson v. Jackson*, 40 Mich. 702; *Thurston v. Prentiss*, 1 Id. 198; *Hanchett v. McQueen*, 32 Id. 25. In such case the attachment or execution creditor is a proper party to the bill, for at most he stands in the place of the vendor, bound by his duty, if he claims his interest. *Morris v. Hoyt*, 11 Mich. 17; *Daily v. Litchfield*, 10 Id. 36; *Woodward v. Clark*, 15 Id. 104; *Rogers v. Odell*, 36 Id. 411; *Chapman v. Morgan*, 55 Id. 126 (20 N. W. Rep. 821).

The decree below will be reversed, and the case remanded; the defendant McConnell to have 20 days in which to answer.

MORSE and GRANT, JJ., concurred. CHAMPLIN, C. J., and LONG, J., did not sit.

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MORGAN E. DOWLING v. ALEXIS M. SALLIOTTE.

Husband and wife—Deed—Joint tenancy—Survivorship.

1. A deed executed to a man and woman who are in *fact* husband and wife creates an estate in joint tenancy under How. Stat. §§ 5560, 5561.
2. In such a case, if the *fact* of such relationship is not stated in the deed, it may be shown by parol testimony.
3. The "married woman's act," so called (How. Stat. § 6295), did not repeal by implication How. Stat. §§ 5560, 5561, in so far as they provide for the creation of an estate in joint tenancy by the execution of a deed to husband and wife; citing *Fisher v. Provin*, 25 Mich. 347.
4. The fact of the filing of a *per curiam* opinion does not detract from the *force* of the decision, nor indicate that the question was lightly treated, but rather that the Court were united in regarding the point as without force, and as not requiring elaboration.

Error to Wayne. (Hosmer, J.) Argued October 15, 1890. Decided November 14, 1890.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Morgan E. Dowling, in *pro per.*, for appellant.

Stewart & Galloway, for defendant.

CAHILL, J. The question in this case is whether, where a deed is made to a man and woman who are in fact husband and wife, but such relationship does not appear upon the face of the deed, it creates a tenancy in common or a joint tenancy under How. Stat. §§ 5560, 5561.

The conceded facts in the case are as follows: On the 3d day of March, 1858, John B. Cicotte *et al.* were the owners in fee of the lands in controversy in this cause, and on that

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day, by a quitclaim deed, conveyed said lands to George Cicotte and Ellen Cicotte. On the 30th day of December, 1871, George Cicotte died intestate. On the 1st day of October, 1874, Ellen Cicotte deeded said lands to defendant, Alexis M. Salliotte. On the 25th day of March, 1890, the children of George and Ellen Cicotte, as heirs at law of Ellen Cicotte, by a quitclaim deed conveyed all their right, title, and interest in and to said lands to Morgan E. Dowling, the plaintiff. The only fact not conceded on the trial was that George and Ellen Cicotte were husband and wife. Plaintiff made no proof of it, and, when the defendant offered proof of that fact, objected, on the ground that, as the relationship was not stated in the deed, it was incompetent and immaterial to prove such relationship *aliunde*. The plaintiff claims that the deed from John B. Cicotte *et al.* to George Cicotte and Ellen Cicotte created an estate in common, and that, when George Cicotte died, his heirs became the legal owners of an undivided half of said lands, which they deeded to plaintiff. How. Stat. § 5560. The defendant claims that, at the time John B. Cicotte *et al.* deeded said lands to George Cicotte and Ellen Cicotte, the latter were husband and wife, and, although not described as such in the deed, the fact may be shown by parol testimony; that the conveyance to them created an estate in joint tenancy under How. Stat. § 5561; and that, when George Cicotte died, Ellen Cicotte, as survivor, became the legal owner of all said lands, which she deeded to defendant.

The testimony offered to show that George and Ellen Cicotte were husband and wife, was properly admitted. In fact, without such testimony the plaintiff's case would have been fatally defective. He claims under a deed from the children of George and Ellen Cicotte as the heirs at law of George Cicotte. It was an essential part of his case, therefore, to prove that these children were born in

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lawful wedlock, and without such proof the defendant would have been entitled to a judgment.

The court below was also right in holding that the deed to George and Ellen Cicotte created in them an estate in joint tenancy, and that, upon the death of George, Ellen took the whole as survivor. The two sections of the statute above referred to read as follows:

"SEC. 5560. All grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"SEC. 5561. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

The plaintiff claims that section 5561 has no application to this case for two reasons:

1. Because the fact is not recited in the deed to George and Ellen Cicotte that they were husband and wife.
2. Because sections 5560 and 5561, so far as they relate to husband and wife, were repealed by implication by the married woman's act. How. Stat. § 6295.

We cannot agree with the plaintiff in either of these views. The statute does not provide that in all grants and devises of land made to persons who are *described* in the conveyance as husband and wife they shall take as joint tenants. To give it such a meaning would be to do violence to sound rules of construction. The intention of the statute was to declare that grants and devises made to two or more persons holding *in fact* certain relations to the estate, or towards each other, should create estates in joint tenancy. To say that the existence or non-existence of this *fact* must depend upon the recitals in a conveyance would be to substitute form for substance. If the rule contended for is correct as applied to husband and wife, then it would apply also to trustees and mortgagees.

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It frequently happens that a trust is declared by the trustee by means of some writing outside of the conveyance to him, which may be in form a grant or devise in fee. A trust arises sometimes also by operation of law. In such cases would it be seriously contended that the statutes did not cover the trust-estate, because the conveyance to the trustee was silent as to the character of the grant? So also of a deed, in form absolute, but intended as security. If the fact be once established that the deed was intended as security, would not the two or more grantees named therein take as joint tenants under the statute?

In so far as the case of *Jacobs v. Miller*, 50 Mich. 119 (15 N. W. Rep. 42), seems to be opposed to this view, I cannot agree with it. I find no fault with the conclusion in that case, as applied to the particular facts then under consideration. There were reasons of great force why the recitals in the deed in that case could not be shown to be untrue, which have no application here. As at common law it was always competent to make husband and wife tenants in common by proper words in the deed or devise by which they take indicating such intention (1 Washb. Real Prop. 425), so I have no doubt it is still competent under our statute. But I do not think the mere failure to describe the grantees as husband and wife would have that effect if they sustained that relation in fact.

The second point relied on by plaintiff is, in my opinion, equally untenable. The point was expressly ruled by *Fisher v. Provin*, 25 Mich. 347. Plaintiff insists that that case was not well considered; that no opinion was written in it for which any one of the Judges assumed responsibility; and upon this he bases the hope that the Court, as at present constituted, will be the more ready to revise and reverse it. The fact that there was a *per*

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curiam opinion filed does not detract anything from the force of the decision, nor indicate that the question was lightly treated. It indicates only that the Court were united in regarding the point as without force, and as not requiring elaboration. Since that case, the question has been many times passed upon indirectly, and *Fisher v. Proven* recognized as law. *Aetna Ins. Co. v. Resh,* 40 Mich. 241; *Manwaring v. Powell,* Id. 371; *Allen v. Allen,* 47 Id. 74 (10 N. W. Rep. 113); *Jacobs v. Miller, supra; Vinton v. Beamer,* 55 Id. 559 (22 N. W. Rep. 40). The decision in each of these cases went upon the theory that the statutes in question were still in force as applied to husband and wife.

Much of the argument of plaintiff's counsel on this point would have greater force if it were true, as argued by him, that husband and wife took by entireties, as at common law, and not as joint tenants under our statutes. I am aware that in some of the cases just cited the language of the opinions intimates that husband and wife still hold by entireties; but to this extent there was a failure to discriminate closely. Such a holding was unnecessary to a decision of the point involved. The point to be decided in all those cases was whether, as between husband and wife claiming under a conveyance to both, the doctrine of *survivorship,* applied in favor of one upon the death of the other, and it was held that it did. But the *jus accrescendi* is as much an incident of estates in joint tenancy as of estates in entirety. 2 Cooley, Bl. Comm. 181, and note 2; 1 Washb. Real Prop. 406. Strictly speaking, estates in entirety were abolished in this State by the statute of 1846 (How. Stat. § 5559), which reads as follows:

"Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of

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which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter."

Treating the estate of a wife, when held jointly with her husband, as one of joint tenancy, there is nothing in the married woman's act which is opposed to it in spirit. The wife has the same quality and degree of title as her husband, and can do as much with it.

The case of *Meeker v. Wright*, 76 N. Y. 267, cited by plaintiff, was based on the doctrine of the common law, and held that, as it was inconsistent with the married woman's act, it must give place to it. The reasoning of that case does not apply in this State, for the reasons pointed out.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MORSE, J., did not sit.

DAVID HUNT v. FRANK S. RUMSEY.

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Bills and notes—Good-faith holder—Consideration.

The question upon which this case turned was whether the plaintiff was an innocent purchaser of a note the consideration for which was a "Red Lyon Wheat Note," which fact was found against the plaintiff under a charge which is held to have been sufficient to enable the jury to reach a conclusion upon the facts in harmony with the law of such cases as laid down by this Court.

Error to Wayne. (Brevoort, J.) Argued October 16, 1890. Decided November 14, 1890.

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Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

B. T. Prentis, for appellant.

Samuel W. Burroughs, for defendant.

CHAMPLIN, C. J. Suit was commenced in justice's court to recover upon a promissory note, of which the following is a copy:

"$80. HURON, MICH., August 24, 1886.

"September first, 1887, I promise to pay to the order of B. H. Smith or bearer eighty dollars ($80.00), for value received, with interest at the rate of 7 per cent. per annum.

"FRANK S. RUMSEY."

The defendant pleaded the general issue, and gave notice that the note was a substitute note for what is called a "Red Lyon Wheat note," and that the alleged note was without value or consideration, and was obtained by fraud and false pretenses; and also that he never executed and delivered the note in suit for value and consideration.

The testimony was such that it cannot be doubted that the note for $180 originated in one of those transactions which were so frequent in 1886, whereby farmers were duped and defrauded into giving their notes for wheat at a fictitious value, under representations that some bogus seed and cereal company would sell twice the quantity for a like fictitious price, and pay over to the farmer the avails less their commission. We have held that where the parties were *in pari delicto* such notes could not be enforced unless they had passed to an innocent purchaser for value. The question in this case turned almost entirely upon the fact whether plaintiff was such purchaser. All the facts bearing upon this question were put in evidence and submitted to the jury, who found a verdict in favor of the defendant, and, although the cir-

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cuit court in his instruction to the jury may not have presented the law of the case so as to be unexceptionable, yet, taken as a whole, the point upon which the case must necessarily have turned was given to the jury in a manner that conveyed to them a proper guidance to enable them to reach a conclusion upon the facts in harmony with the law of such cases.

After instructing the jury that, as a matter of law, between the original parties, the note given for the wheat was void, he told them that, if they believed the testimony of the defendant, which tended to show that Hunt, at the time he purchased the note of Smith, knew what the note was given for, the plaintiff could not recover, and that if, on the other hand, they believed that Smith received the note all right, as he said he did, when he gave it to Mr. Hunt for the organ, that there was nothing more than what had transpired in an ordinary business transaction, then Mr. Hunt, knowing nothing about the past, knowing nothing about what it was given for, would be a holder in good faith, and he would be entitled to recover, and that their verdict must be for the plaintiff. In view of the testimony embodied in the bill of exceptions, these instructions substantially covered the law in the case, it having appeared in evidence that the original note which was given in the wheat deal was made and delivered by Rumsey, and was for 12 bushels of wheat at $15 a bushel, and the further agreement that the American Seed & Cereal Company would, on or before September 1 of the next year, sell 24 bushels of wheat for Rumsey at $15 a bushel, and pay him the avails thereof, less $5 a bushel for their commission. Afterwards, and before the note became due, this note seems to have been held by one Edwin Fay, who was the man who delivered the wheat to Rumsey. Smith testified that—

"Edwin Fay held a note for $175 or $180 against Rum-

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sey, and Fay owed me; so Fay and I went to Rumsey, and he [Rumsey] gave this note [in suit], and the amount of it was indorsed on Fay's $175 note, and with this note Fay paid what he owed me."

This testimony shows that the only consideration for the note in suit, if any moved to Rumsey, is the same, and no other, and no different, than that which was the consideration for the $180 wheat note, and is open to the same defenses as that note in the hands of parties who were aware of the original transaction.

Error is assigned upon cross-examination of the plaintiff with reference to his conversations with defendant, but we discover no error committed by the court in his rulings upon such cross-examination. See *Johnston Harvester Co. v. Miller*, 72 Mich. 265 (40 N. W. Rep. 429), and *Goodrich v. McDonald*, 77 Id. 486 (43 N. W. Rep. 1019).

There was no error in admitting testimony to show that the witness Smith had been guilty of improper conduct respecting the trial before the justice of the peace. *Denton v. Smith*, 61 Mich. 431 (28 N. W. Rep. 160).

Other assignments of error were discussed upon the argument of the cause and in the brief of counsel, but we do not think the errors were such as prejudiced the rights of the plaintiff upon the trial of the cause.

The judgment will therefore be affirmed.

CAHILL and LONG, JJ., concurred. MORSE and GRANT, JJ., did not sit.

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DAVID RIBBLE v. EDGAR STARRAT.

[See 79 Mich. 204.]

Contributory negligence—Charge to jury.

A request for an instruction in a negligence case that if the defendant knew that the plaintiff was about to oil a saw, and assented to it, and while plaintiff was oiling it negligently pushed plaintiff onto the saw, he may recover damages for the injuries thereby occasioned, is defective in omitting the important element of plaintiff's non-negligence.

Error to Wayne. (Hosmer, J.) Argued October 15, 1890. Decided November 14, 1890.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James D. May (*John J. Speed*, of counsel), for appellant.

C. I. Walker and *E. G. Stevenson*, for defendant.

LONG, J. This cause was once before this Court, and is reported in 79 Mich. 204. In the former trial, plaintiff had judgment, which was reversed, and a new trial ordered. A new trial has been had before a jury, and verdict and judgment rendered for the defendant. The plaintiff now bring the case to this Court by writ of error.

The allegations in the declaration were somewhat set forth in the former opinion by Mr. Justice GRANT, and need not be restated. It is an action of trespass on the case against defendant for negligently causing a personal injury to the plaintiff by hitting him with a board while he was oiling a circular buzz-saw, then in motion, in the

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performance of his duty to his employers. The facts shown upon the trial, as stated in the record, are briefly, as follows:

"The plaintiff, on his part, testified that he was an employé in the planing-mill of Morton & Backus, in the city of Detroit; that the defendant was engaged, on the day on which plaintiff was injured, in using a cross-cut circular saw. Defendant was not an employé in the mill, but had had some lumber planed in the mill, and, in order to hasten its delivery, was himself using the saw to square the ends of the boards. That the foreman in the mill said to plaintiff that defendant was burning up the saw, and directed him to oil the saw; that plaintiff, who had been engaged in working on a planer, went to the saw, and said to the defendant that he was going to oil the saw, whereupon the defendant stepped back so as to allow him to do so, and the plaintiff then proceeded to oil the bearings of the saw, and he had oiled one of them, and was engaged in oiling the other, when he was struck on the shoulder with a board by the defendant with such force as to push him forward, and onto the saw, which cut his wrist, and injured him severely. The saw was hung by a frame from the ceiling so as to allow it to be brought forward by a swinging motion, the boards being placed on the saw table transversely to the movement of the saw frame. While engaged in oiling the bearings, plaintiff testified he held the can in his left hand, and with his right he held a file, with the point of which he removed the saw-dust which had accumulated in the holes into which the oil was poured. The saw was not stopped while plaintiff was oiling. There was a guard which covered the saw, excepting the portion within about three and one-half inches of the saw table, and the plaintiff testified there was no danger in oiling the saw while in motion, and the defendant's witness Furnier also testified to the same effect. Plaintiff further testified that the effect of the blow from the board was to cause him to lose his balance, and involuntarily he put out his hand to save himself from being thrown onto the saw, and in doing so he put his wrist in contact with the saw, causing the injury. He further testified that he had oiled this machine, and other machinery in the mill, a number of times, and was familiar with the proper way of doing it.

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"The defendant testified that he was engaged in sawing off the ends of boards, using the saw by which the plaintiff was injured; that plaintiff did not inform him that he intended to oil the machine, and he did not know he was doing so until after plaintiff was injured. Furnier, a witness on the part of defendant, the foreman and manager of the mill, and from whom the plaintiff got his orders, testified that it was not part of plaintiff's duty to oil the machine, and he did not direct him to oil it, as sworn by plaintiff, and that plaintiff had nothing to do with the saw, and had no right to do anything in relation thereto without instructions, and that it was his rule not to allow anybody to oil the saw when it was running, and he had instructed the plaintiff not to oil the saw while in motion, but there was no danger in so oiling it if one knew what he was doing.

"The foregoing is a substantial statement of all the circumstances under which the plaintiff was injured. After the testimony was closed, the jury were permitted to go to the mill and see the machine by which the plaintiff was injured."

The assignments of error all relate to the charge of the court, as given, and the refusal of the court to charge as requested by counsel for the plaintiff. Counsel for the plaintiff requested the court to charge the jury—

"That if the defendant knew the plaintiff was about to oil the saw, and assented to it, and while plaintiff was so engaged the defendant negligently pushed the plaintiff onto the saw, then the plaintiff may recover damages for injuries occasioned thereby."

When the case was in this Court before, it did not appear that plaintiff notified defendant that he was about to oil the machinery, or that defendant knew he was oiling it. The plaintiff now testifies that he went to the saw, and said to the defendant that he was going to oil it, whereupon the defendant stepped back so as to allow him to do so, and the plaintiff then proceeded to oil the bearings of the saw, etc., when he was struck on the shoulder with a board by the defendant with such force

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as to push him forward, and onto the saw. The defense was:

1. That the plaintiff had no right or duty to oil the saw.
2. That defendant was rightfully using the saw, and plaintiff, without his knowledge or consent, came and meddled with it.
3. That plaintiff did not give him notice that he was about to meddle with it, nor did he know it until after the accident occurred.

Defendant's counsel contend that there was no error in refusing the above request, as the court fully stated the law upon that branch of the case, and that from his own testimony the plaintiff was guilty of contributory negligence. From an examination of the charge, it does not appear that this request was given. The court, in speaking of the allegations in the declaration, said that the averment that he was engaged in the performance of a duty in oiling the saw is a material one, and that the *onus* was on the plaintiff to prove that fact. The court then stated:

"I charge you further in this connection that, if you find that the plaintiff was not in the performance of a duty in oiling the saw, you cannot find a verdict against the defendant, because the plaintiff must prove by a preponderance of testimony that the defendant was guilty of gross negligence and malice in pushing him upon the saw, and there is no evidence of such gross carelessness or malice; and if you should find that he was not in the performance of a duty in oiling the saw, then under those circumstances the defendant would be entitled to a verdict."

This was stating the proposition contained in plaintiff's request in a negative way, and plaintiff would have had a right to complain of the refusal of the court to instruct the jury as requested, if the request had gone far enough, and contained all the elements necessary to the plaintiff's recovery. But it fell short of this, and lacked one

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important element; that is, that the plaintiff himself was free from negligence. If the defendant did know that the plaintiff was about to oil the saw, and assented to it, and while the plaintiff was so engaged the defendant negligently and carelessly pushed him onto the saw, then the plaintiff would have had a right to recover, provided he was not guilty of contributing to his own injury in attempting to oil the saw as he did. As the request was framed, however, the court was not in error in refusing it.

It is further contended by counsel for plaintiff that the court was in error in stating to the jury:

"If you find from the testimony it was dangerous and careless for the plaintiff, standing in front of the saw, to attempt to oil the bearings, while the saw was in motion, with his left hand, then you must render a verdict for the defendant, even though you should be satisfied from the proofs that the defendant negligently struck him with the board."

This contention is based upon the testimony of the plaintiff and Mr. Furnier, the foreman, that there was no danger in so oiling if one knew what he was doing, and that there was no testimony showing it to be negligent or careless to oil the saw while in motion. All the claim made upon the trial by the defendant was that it was negligent to oil with the left hand, as the plaintiff testified that he was familiar with the manner of oiling, and had oiled this and other machinery a number of times. There was no error in this part of the charge. The circumstances surrounding the transaction had been fully detailed to the jury. They had visited the mill, and they had a right to say whether it was careless and negligent for the plaintiff, under the circumstances, to attempt to oil that saw while in motion, and to do so with the left hand. The situation of the saw, the place where the plaintiff stood, and all the other circumstances

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and surroundings, as well as the testimony of witnesses, were to be taken into consideration by the jury in determining, as a matter of fact, whether it was negligent to oil the saw as he did. The court very properly stated to the jury in that connection:

"And, when I speak to you of contributory negligence, I mean this: The plaintiff cannot recover in the case unless you should find that the plaintiff was himself free from contributory negligence, and if you should find that a reasonably prudent man, in the exercise of prudence, would not or should not have oiled the saw when in motion, why then, gentlemen, that would be such an act as would constitute contributory negligence."

We find no error in the case, and the judgment must be affirmed, with costs.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. MORSE, J., did not sit.

JOHN LUTTENTON v. WILLIAM FRITZ.

Trespass—Injury to animal—Insufficient evidence.

In this case plaintiff sought to recover the value of a horse whose leg was broken, as alleged, by defendant's throwing a stone while chasing the animal from his father's wheat field. And it is held that a verdict should have been directed in favor of defendant for want of evidence tending to make out plaintiff's case.

Error to Jackson. (Peck, J.) Submitted on briefs October 22, 1890. Decided November 14, 1890.

Trespass. Defendant brings error. Reversed. The facts are stated in the opinion.

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A. E. Hewett (Austin Blair, of counsel), for appellant.
Barkworth & Cobb, for plaintiff.

MORSE, J. This is an action of trespass, originally brought in justice's court, to recover the value of a horse which plaintiff claims was injured by defendant, so that the animal had to be killed. Plaintiff recovered in that court, and, upon appeal to the circuit, judgment was again rendered in his favor. The chief error assigned is that the circuit judge did not direct a verdict in favor of the defendant as requested.

The undisputed evidence showed that the horse was trespassing upon the lands of defendant's father. The defendant testifies that he saw the horses of plaintiff in his father's wheat field, and ran after them to drive them out; that they jumped over the fence into the highway, and he went back to his work plowing. The horse in question was found in the highway with his leg broken. The theory of the plaintiff was that the defendant threw a stone at the horse, which struck and broke its leg. The defendant's counsel contend that there was no testimony legitimately tending to support this theory.

The testimony relied upon to support plaintiff's claim may be summarized as follows: Plaintiff and defendant's father owned adjoining farms. In May, 1888, in the afternoon, plaintiff turned his team of horses into the highway to feed while he planted beans. About 5 o'clock P. M., the horse was found just outside of the fence in the highway with his leg broken. The plaintiff and others testified that inside the field, about 12 rods from where the horse was found, they found blood on the ground, and marks showing that the horse had dragged one leg. They found also a place where it looked as if the fence had been let down and put up again recently,

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as the rails did not lie in the old notches. There was blood on the bottom rail, and the prints of a horse's hoof, and there was blood on the rails on each side of the fence. Plaintiff says:

"Right near where the fence had been let down in the field, there had been a stone removed, nearly as large as my head, and where that stone had lain the ground was moist; and around that stone it had bled so that it had run off around that stone some. The stone was found down in the crook of the fence saturated with blood,—covered with blood. * * * Where the stone was found, I placed it back in the place where it had come from, and it fitted exactly."

Upon cross-examination, plaintiff testified:

"I showed him [defendant] the stone covered with blood. He wanted to know if I claimed that was the stone he threw. I said, 'No, sir. That is the stone he stood and bled on, and was thrown down in the crook of the fence to conceal the blood.'"

When the plaintiff's proofs were closed, defendant's counsel asked the court to direct a verdict for defendant, on the ground that there was no evidence tending to show that the defendant had thrown anything at the horse, or had done anything more than to drive the horse out of the field where the animal was a trespasser by shouting and running after it, there being some testimony that the defendant was seen chasing the horse and hallooing. The court refused to do so. Thereupon, the plaintiff was again put on the stand in his own behalf, and testified:

"I examined at about the point where the horse commenced to draw his foot on the ground that I spoke of before, and found a rock there just about the size of my fist. It lay loose on the ground, and one side of it was a little moist, as though it had been brought from somewhere and recently left there. This stone was found

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right at the point where the horse commenced to drag his foot."

On cross-examination, he further said that he found the stone six or eight feet from the fence, and that he just picked it up and looked at it, and threw it down again. Did not keep it, but kept the other one. When asked why he did not testify about this stone when first examined, he answered that he was not asked to. Mr. Rowe was then called as a witness by plaintiff, and gave evidence as to the condition of the fence, and seeing blood and the large stone, substantially corroborating the plaintiff in this respect. He also said:

"My attention was called to a smaller stone, the size of my fist, perhaps a little larger, that by the appearance had been evidently thrown into the corner of the fence."

The father of the defendant testified that this corner of the fence, which the plaintiff claimed had been recently let down and put up again, was let down in the spring, when he was clearing the fence corners, and remained down until he sowed clover seed in April. Then he put it up, and it had since remained up. The defendant denied hitting the horse with anything, and claimed he did not get nearer than eight or ten rods of the animal; that he saw the horse jump the fence near by where he was found; that as he jumped he fell, and then got up again, and defendant returned to his work.

The circuit judge correctly charged the law on the supposition that the jury might find as a matter of fact that the defendant threw a stick or stone, and broke the horse's leg with the same, explaining to them under what circumstances the throwing of such stick or stone would render him liable for the damage to the horse.

The theory of the plaintiff, and upon which he sought

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to recover, is stated by his counsel in their brief as follows:

"The theory upon which plaintiff presented this case to the jury was that the defendant threw at the horse the stone found at the point where it commenced to drag its foot; that such stone struck and broke the leg. Thereupon, he let down the fence, during which time the horse stood and bled over the stone, which was placed in the corner of the fence by the defendant for the purpose of concealment. The horse was thereupon driven into the highway and left."

This is a theory constructed entirely from circumstances and inferences therefrom. The question is, was the jury warranted in finding this theory to be a fact by legitimate inferences from the testimony? We think not. The testimony shows that stones were lying, both big and little ones, along the fence and in the corners on both sides. No examination was made of the wound in the horse's leg, or any testimony offered to show what caused it. It was simply shown that it was broken above the gambrel joint. The verdict should have been directed for the defendant.

The judgment is reversed, with costs, and a new trial granted.

The other Justices concurred.

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JAMES MEATHE v. ELIZABETH MEATHE.

Divorce—Habitual drunkenness.

1. Occasional intoxication is not habitual drunkenness in a woman any more than it is in a man.
2. The strong man ought to relinquish the gratification of the same appetite for drink that he asks the weak woman to give up.
3. In this case a divorce was granted in the court below on the grounds of habitual drunkenness and extreme cruelty, which decree is reversed for reasons stated in the opinion.

Appeal from Wayne. (Reilly, J.) Argued October 24, 1890. Decided November 14, 1890.

Bill for divorce. Defendant appeals. Decree reversed and bill dismissed. The facts are stated in the opinion.

Wisner, Speed & Harvey, for complainant.

Atkinson; Carpenter, Brooke & Haigh, for defendant.

[Briefs of counsel are confined to a review of the testimony.—REPORTER.]

MORSE, J. The causes alleged for a bill of divorce in this case are habitual drunkenness and extreme cruelty. A decree was granted in the court below.

It is not claimed by complainant that defendant was ever cruel or even abusive to him when she was sober, and he testifies that when not under the influence of liquor she was a model wife and housekeeper. This is also shown by every witness in the case. It may be, as stated by the counsel for complainant in their brief and argument, that the personal appearance of the defendant, while in the court below, was that of a confirmed drunk-

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ard; that she carried the marks of such dissipation upon her face; and that such appearance had something to do with the decision of the circuit judge who granted the decree. But she does not appear in this Court, and we have no evidence before us in the record to substantiate this statement as to her appearance. We have carefully examined the evidence, and from such examination we are not prepared to find this woman an habitual drunkard, and to put her away from her husband on that account.

The parties to this suit were married October 6, 1868, and have ever since, until the filing of this bill, lived together. The husband had but little, if anything, at the time of the marriage. He has been faithful and energetic in business, and has prospered. His wife has been equally industrious with him. She has been frugal in the home-keeping, of which she has always had full and undisputed control. Up to the very time of the filing of this bill, the husband has had such unlimited confidence in her prudence and economy that he, each week, has handed over to her a stated allowance, increasing it as he prospered in business, leaving the expenditure of such allowance entirely to her own judgment.

There is no doubt but that at times the defendant has drank more than she ought to, and there is testimony tending to show that on a few occasions she has been, in late years, so much under the influence of liquor or beer as to become noticeable on that account. But she is by no means shown to be an habitual drunkard. The evidence of her intoxication comes almost entirely from her husband and his relatives, while nearly all her neighbors, who were intimate with her, some of them living next door to her, never saw her under the influence of liquor, and did not know that she drank at all. During all the time she managed her household affairs neatly and

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in order, much of the time without any help, save two nieces, who were young girls living with her out of her and her husband's bounty. The husband himself is addicted to the moderate use of stimulants. He testifies that he takes a glass of whisky every evening before supper, and that he has beer sent to his house by the case. He further testifies that from September, 1888, until April, 1889, his wife did not drink a drop. During nearly all this time he kept beer in the house, a constant temptation to her. It cannot be that he would have done this if he had considered her a confirmed drunkard beyond any hope of permanent reform, unless he wished to prevent such reform. It shows that he had confidence in her ability to abstain from drinking, or that he did not think she would drink enough to be of detriment to her. His bill was filed May 15, 1889, soon after his wife had passed, for over six months, a life of total abstinence, with liquor constantly in the house, and in use by him at his meals in her presence.

Occasional intoxication is not habitual drunkenness in a woman any more than it is in a man. The defendant denies that she was ever intoxicated, and explains each specific charge of drunkenness brought against her. She admits that she has drank beer, and occasionally wine, and, at one or two times, a little whisky. She claims that one glass of beer affects her so that her husband notices it by the appearance of her eyes; but according to all the testimony she is neither a steady nor confirmed user of intoxicating stimulants. She seems to love her husband dearly, and since the bill was filed has implored him to return to her and stop the proceedings, promising that, if the drinking of even a glass of beer offends him, she will forever abstain from it. He says that when she is sober his "home is heaven." We think no divorce ought to be granted. It seems that there is good reason

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to belive that, if the husband shall return and do his full duty towards this woman, both of them can be again happy in their marital relations. If she has acquired a taste for liquor which it will cost her a struggle to conquer, he ought to be willing to drop his glass of whisky before supper, and to keep beer away from his home. The strong man ought to relinquish the gratification of the same appetite for drink that he asks the weak woman to give up. There should be mutual forbearances and mutual sacrifices. Under all the circumstances of this case, we must refuse a divorce.

The decree of the court below will be reversed, and complainant's bill dismissed, with costs, and a solicitor's fee of $100.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

EMIL S. HEINEMAN ET AL. v. SELIGMAN SCHLOSS ET AL., GARNISHEES OF RACHAEL SOLOMON.

Garnishment—Fraudulent conveyances—Constitutional law.

Act No. 244, Laws of 1889, amendatory of How. Stat. §§ 8059, 8091, which extends their operation so as to enable creditors to reach the *value* of property of the principal defendant received and held by the garnishee under a conveyance or title void as to creditors, and which he has disposed of, applies to garnishment proceedings instituted *after* the act took effect, although the goods were received and disposed of *prior* to that date.

Error to Wayne. (Brevoort, J.) Argued October 23, 1890. Decided November 14, 1890.

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Garnishment proceedings. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson, for appellants.

Julian G. Dickinson, for garnishee defendants.

CAHILL, J. The plaintiffs, having recovered a judgment against Rachael Solomon, the principal defendant, commenced this suit in garnishment against the defendants, on October 11, 1889. The facts necessary to an understanding of the case are as follows:

Rachael Solomon was engaged in the mercantile business, having stores in Escanaba, Gladstone, and Oscoda, in this State. She purchased, in the summer and fall of 1888, on credit, goods amounting to $50,000, and upwards, which were shipped to her various stores. Her husband, Selig Solomon, was the general manager of her business. In November, 1888, Selig Solomon went to Detroit, and had an interview with Schloss Bros. & Co., the garnishee defendants, the result of which was that a chattel mortgage was prepared which, on its face, undertook to secure the payment of $8,000 of indebtedness to Seligman and Emanuel Schloss, and $5,825.17 to Schloss Bros. & Co. This mortgage was afterwards sent to Au Sable, and was signed by Mrs. Solomon, and filed on the evening of November 13, 1888, in the town-clerk's office at Au Sable. Subsequently, Schloss Bros. & Co. foreclosed their chattel mortgage, and, under their foreclosure proceedings, seized all the merchandise of Rachael Solomon at Gladstone and Escanaba, and sold all the goods that they found pursuant to the power of sale in the chattel mortgage.

This writ of garnishment issued October 11, 1889. The disclosure of the garnishees, filed November 5, 1889, showed that they had not jointly and severally any property, money, etc., in their possession, custody, or control,

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belonging to the said Rachael Solomon, and stated that another writ of garnishment was pending between the same parties, issued in said cause on February 7, 1889. This fact is not important, as no point is made upon it by either party. An examination of the garnishees before a commissioner was required and submitted to, and demand was made by plaintiffs for statutory issue and trial by jury. The trial occurred in May, 1890, in the court below. Upon the trial, the plaintiffs introduced evidence tending to show that the chattel mortgage executed by Rachael Solomon to the garnishee defendants was fraudulent, and was intended to hinder, delay, and defraud the creditors of Rachael Solomon; that the garnishee defendants had taken the property covered by the chattel mortgage, to the value of several thousand dollars, into their possession, and had sold the same, and had received the proceeds of such sales in money, amounting to upwards of $9,000; and the plaintiffs claimed the right in this suit to recover the money so in the hands of the garnishee defendants, as money had and received by them for the plaintiffs' use.

When the plaintiffs had rested their case counsel for garnishees moved the court to direct a verdict for the defendants, on the ground that when the garnishment proceedings were commenced, October 11, 1889, the garnishees had not in their possession, custody, or control any property, money, or effects of Rachael Solomon, the principal defendant; that the property which had been taken in November, 1888, under the chattel mortgage was the only property in controversy, and that property had all been sold for cash, under the foreclosure of the mortgage, in November and December, 1888; and that plaintiffs could not recover in this action the value of the property sold under the chattel mortgage. The court directed

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the jury as requested, and upon this instruction the only question in the case arises.

It is not seriously contended but that, under the statute as it existed prior to 1889, the instruction of the circuit judge was in accordance with the rule laid down by the former decisions of this Court. *Fearey v. Cummings,* 41 Mich. 376; *Folkerts v. Standish,* 55 Id. 463. But it is claimed that under Act No. 244, Laws of 1889 (3 How. Stat. pp. 3753, 3757), the plaintiffs had a right to recover the value of the goods that had been fraudulently received by the garnishees and converted into money. The act referred to amended How. Stat. §§ 8059, 8091, and, as amended, they read as follows:

"SEC. 8059. From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels, and effects under his control, belonging to the principal defendant, or of any debts due, or to become due, from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant which such garnishee defendant holds by conveyance, transfer, or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal defendant which such garnishee defendant received or held by a conveyance, transfer, or title that was void as to creditors of the principal defendant; and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant."

"SEC. 8091. If any person garnished shall have in his possession any of the property aforesaid of the principal defendant which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnished shall have received and disposed of any of the property aforesaid of the principal defendant which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable, as garnishee, on account of such property, and for the value thereof,

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although the principal defendant could not have maintained an action therefor against him."

It is insisted on behalf of the defendants that to apply the statute of 1889 to this action would be to give it retroactive effect; that there is nothing upon the face of the act indicating that it was intended to have such effect; and that the rule is that all statutes are prospective in their operation, except where a contrary intention is clearly evidenced by the statute itself. The rule contended for by the defendants' counsel is correct, but it does not apply to this case. That rule could have been appealed to in defense of the original garnishee proceeding that was commenced February 7, 1889, because that suit was commenced before the act of 1889 had taken effect. But the garnishee law is purely a remedial statute. It gives no rights and creates no liabilities. Everything that can be accomplished by means of it could have been accomplished by other means if the garnishee law had never been passed. Counsel for defendants says:

"Under the mortgage, defendants' sale of the property was valid under the law as far as plaintiffs are concerned. Could the Legislature, by the amendatory enactment, give the plaintiffs a claim upon such property or its value, and make defendants liable therefor?"

The trouble with this inquiry is that it does not correctly state the situation of the defendants with reference to this property. If the mortgage under which they took the property was fraudulent, the mortgagees obtained no rights under it, and could not lawfully exercise any rights, as mortgagees, over the property under it. The funds received by them on a sale of the property remained in their hands as equitable assets for the benefit of the creditors of the mortgagor. Under the statute, as it existed prior to the amendment of 1889, this fund could not be reached by garnishment, but it was liable to be reached

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in equity. The effect of the amendment is not to enlarge the liability of the defendants, but to render them liable at law instead of in equity, as formerly. Treating the garnishee statute, then, as one affecting the *remedy* merely, it is not giving the statute of 1889 retroactive effect to apply it to suits commenced after the act took effect, simply because the transaction upon which the suit is based took place before that time.

In determining whether a statute is retroactive in its effect, regard must be paid to the purpose of it. If the statute is one that confers new rights or creates new liabilities, then to apply it to past transactions, so that new rights and liabilities spring up where none existed when such transactions occurred, is to give it retroactive effect; but when the statute is one giving a new or different remedy for a pre-existing right or liability, then it is not retroactive, as applied to suits commenced after the act has taken effect, because past transactions are involved in such suit. In the latter case the statute does not relate to or attempt to characterize transactions, but gives a certain remedy therefor, and the remedy may be pursued at once after the act takes effect.

The judgment is reversed, and a new trial granted.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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IRA C. HATCH v. WALTER H. McBRIEN.

Statute of frauds—Purchase of goods—Agency—Contract construed.

1. An agreement by a retail grocer to include in his annual order for canned goods a certain amount for a commercial broker residing in the same city, to be paid for on delivery, is held not to make a case of bargain and sale, but of agency.
2. In such a case a request by the broker, made the following year, to order goods "the same as the year before," is held to include payment on delivery.
3. Where in such a case the second order was amended by changing the variety of tomatoes included therein, which change was not made, but the broker did not base his refusal to receive the goods sent on that ground, he cannot urge that as a defense in a suit by the grocer to recover the purchase price, which he had paid to the vendors.

Error to Kent. (Grove, J.) Submitted on briefs October 23, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

FitzGerald & Barry, for appellant, contended:

1. The contract, being verbal, was void under the statute of frauds, which has been held to apply to such contracts; citing How. Stat. § 6186; *McElroy v. Buck,* 35 Mich. 435; *James v. Muir,* 33 Id. 223.
2. The facts as found constitute no more than a mere proposition by defendant to buy goods of the plaintiff, which was not binding even on himself, and might be repudiated at any time, so long as it rested merely in parol; citing *Smith v. Brennan,* 62 Mich. 349.
3. The measure of damages on a breach of a contract of sale by a refusal by the purchaser to take the goods is the difference between the contract price and the market value at the time and place of the breach, with interest; citing 2 Suth. Dam.

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359; *Brownlee v. Bolton*, 44 Mich. 218; *Cahen v. Platt*, 69 N. Y. 348; and as such market value is not found, there was no basis for any damage whatever.

4. A resale of the goods is sometimes made for the purpose of fixing the market value. In order to bind the original vendee, the right of resale must be exercised in good faith within a reasonable time, and in such time and manner as will be best calculated to produce the fair value of the property; citing 2 Suth. Dam. 360; *Brownlee v. Bolton*, 44 Mich. 218; and the resale made by plaintiff after the season for the use of the goods was nearly over, and without showing their condition, afforded no criterion for the measure of damages.

Fletcher & Wanty and *C. J. Potter*, for plaintiff, contended for the doctrine stated in the opinion.

CAHILL, J. This case was commenced in justice's court, where the plaintiff filed the following declaration:

"Now comes the said plaintiff, and complains of the said defendant, who has been summoned to answer the plaintiff in a plea of trespass on the case on promises, for that heretofore, to wit, on the 1st day of April, 1889, the said plaintiff, at the special instance and request of defendant, and as the agent and broker of defendant, purchased for the account of defendant a large quantity of canned goods, to wit, 200 dozen of tomatoes, and 200 dozen of corn, and caused the said goods to be brought to the city of Grand Rapids, ready to be delivered to said defendant.

"That, afterwards, and on, to wit, the day and year last mentioned, plaintiff notified defendant of the receipt of said goods, and requested him to receive them, and take them away; that defendant utterly refused to receive said goods as he had agreed, and has always refused and neglected so to do; that plaintiff, by reason of such neglect and refusal on the part of the defendant, was compelled to, and did, on, to wit, the 1st day of April, 1889, sell the said goods on account of, and for the use of, said defendant, to the best advantage and for the best prices he could obtain for the same; that by reason of a declining market, and of the depreciation in value of said goods, plaintiff suffered great loss and damage in the handling and sale of said goods, to wit, three hundred dollars. Therefore he brings suit.

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"Plaintiff also declares on all the common counts in *assumpsit* to his damage $300 or under."

The plea was the general issue. Plaintiff recovered a judgment in justice's court, and the defendant appealed to the circuit, where the case was tried before Hon. William E. Grove, the circuit judge, without a jury. On the trial in the circuit court, the plaintiff asked leave, and was allowed, to amend his declaration by striking out of it, in the eighth and ninth lines, the words, "and as the agent and broker of said defendant." The court made written findings of fact substantially as follows:

Plaintiff was a retail grocer, and the defendant a commercial broker, both doing business in Grand Rapids. In 1887, when the plaintiff was placing his order for canned corn and tomatoes, the defendant requested the plaintiff to include in his order 100 cases each of corn and tomatoes for the defendant. This was done, and defendant received the goods, paying the actual cost of them at Grand Rapids, when delivered. When it came time to place orders for these goods in 1888, and on February 20, 1888, the defendant again requested the plaintiff to include in his order 100 cases each of Red Seal corn, at 87½ cents per dozen, and 100 cases of Lowenkamp tomatoes, at 92½ cents per dozen, each case containing two dozen cans, the defendant agreeing to receive the goods on delivery, and pay for them at the above prices. The plaintiff complied with this request, and ordered the goods from Thomas Roberts & Co., of Philadelphia. On October 11, 1888, the plaintiff received from Thomas Roberts & Co. the tomatoes ordered, including the 100 cases ordered for the defendant, and on October 29, 1888, he received the corn ordered, including the 100 cases for

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the defendant, of which the defendant had immediate notice.

During the summer of 1888, the prices on such goods depreciated, and the plaintiff, at the request of the defendant, negotiated with Thomas Roberts & Co., and obtained a reduction of prices from those made in the contract to 85 cents per dozen for both corn and tomatoes, and the brand of tomatoes was changed to Red Seal. When the goods arrived, it appeared that the tomatoes were of the kind originally ordered, that is, the Lowenkamp; but it does not appear that any fault was found by the defendant with this change. The defendant requested the plaintiff to deliver the goods to him, but the plaintiff refused unless the defendant would pay for them, which defendant did not offer to do. The plaintiff, in purchasing the goods from Thomas Roberts & Co., obtained them on the following terms:

"Note payable 60 days from date of shipment, or one-half cash in 7 days."

Defendant refused to receive the goods and pay for them on delivery. It does not appear from the findings whether he offered to take them on the terms on which they were sold to plaintiff or not. The plaintiff paid Thomas Roberts & Co. for the goods at the contract price.

After the refusal of the defendant to accept the goods and pay for them, the plaintiff sold 85 cases of tomatoes at the best prices he could obtain for them, sustaining a loss thereon of $17. Up to the time of the commencement of this suit, the plaintiff has been unable to dispose of the canned corn. The court finds that the corn was worth, at the time of the commencement of the suit, 57½ cents per dozen, and that the plaintiff's loss sustained on the corn was $55, that being the difference between the

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price paid and the market price at the time of the commencement of the suit. By agreement of the parties, defendant was to pay his proportionate share of the freight from Philadelphia to Grand Rapids, which the court found to have been $20.40. It also appears from the findings that the agreement between the parties was a verbal one, and that no note or memorandum of the bargain was ever made or signed by the defendant, or any person thereunto authorized by him. For these various sums, together with interest from the time when plaintiff paid for the goods to the commencement of suit, the court found the plaintiff entitled to a judgment. Exception was taken to this judgment that the facts found did not support it.

It is said—*First*, that the contract was for the sale of personal property exceeding in value $50, and that it was therefore void, under the statute of frauds.

But we do not think the facts found make a case of bargain and sale, but rather one of agency. Plaintiff did not agree to sell the defendant the goods in question, but his contract was to order for him of Thomas Roberts & Co. If Thomas Roberts & Co. had refused to furnish the goods, the plaintiff would have been in no way responsible to the defendant for goods bargained and sold, even if the agreement between the plaintiff and defendant had been in writing. This was evidently the view taken of the transactions by the circuit judge, and we agree with him.

Second. It is said that, considering the contract to have been one of agency and not of bargain and sale, the defendant was entitled to the goods on the same terms of payment as the plaintiff obtained them from Thomas Roberts & Co., that is, 60 days.

Whether this is correct as a matter of law or not need

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not be discussed, because it does not appear that the defendant offered to take the goods on such terms, or that he claimed the right to any such credit. The finding is that, in 1887, the defendant ordered goods, and paid for them on delivery; that, in 1888, defendant asked the plaintiff to order goods for him the same as the year before, which, we think, would include the payment for the goods as before, on delivery.

Third. There is nothing in the point that the tomatoes, when received, were of the Lowenkamp variety, as at first ordered, instead of Red Seal, as put into the amended order. The defendant did not put his refusal to take the goods on that ground. It does not appear whether the variety known as "Red Seal" was more or less valuable than the Lowenkamp, except that when the change was made in the order from Lowenkamp to Red Seal the price was reduced from 92½ cents to 85 cents, indicating that the Red Seal may have been of a cheaper variety than the Lowenkamp. If so, the defendant could not complain that he was furnished with a better variety.

We think the facts found by the circuit judge support the judgment, and it will be affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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J. MAURICE FINN v. KATE DONAHOE.[1]

Sale—Payment of purchase price—Chattel mortgage—Pledge—Bill of sale.

1. An agreement by the vendee of a stock of goods to repay a loan, made to enable her to make the purchase, out of the first proceeds realized from the sale of the goods, and before the payment to the vendor of the balance of the purchase price, is not equivalent to an agreement to *secure* the loan by a chattel mortgage on the goods.
2. The *rights* of a vendor who takes possession of the property, with the consent of the vendee, under a bill of sale intended as security for the payment of the unpaid purchase money, and who is in such possession when the vendee executes a chattel mortgage to secure a pre-existing indebtedness, are superior to those of the mortgagee or of his assignee, although the bill of sale is not filed at the time of the execution and filing of the mortgage.
3. The rights of a pledgee in possession are superior to the lien of a mortgage given pending such possession.

   So *held*, where a vendor, in a contest with the assignee of a mortgage given by the vendee to secure a pre-existing indebtedness, claimed to have been placed in possession of the property by the vendee, with the right of control and disposition until one-half of the sum due on the purchase of the property was paid, as also certain other indebtedness of the vendee, and that she was in such possession when the mortgage was given. And it is held that the vendor's rights as a pledgee in possession would be superior to those of the mortgagee or his assignee, and would not be affected by the fact that the vendor had previously secured from the vendee a bill of sale of the goods, intended as security for the unpaid purchase money, which was void for fraud practiced by the vendor, and under which she claimed possession as well as under the later agreement and surrender of possession by the vendee.[2]

Error to Marquette. (Grant, J.) Argued October 17, 1890. Decided November 14, 1890.

[1] Rehearing granted at the January term, 1891.
[2] See *Rall v. Cook*, 77 Mich. 681.

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Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Hayden & Young, for appellant, contended:

1. It was admitted upon the trial by the plaintiff that he stood in the shoes of his assignor (citing *Judge v. Vogel*, 38 Mich. 568, and cases there cited), and that, the mortgage having been given to secure a pre-existing debt, the assignor was not a mortgagee in good faith and for a valuable consideration without notice; citing *Stone v. Welling*, 14 Mich. 514; *Boxheimer v. Gunn*, 24 Id. 372; *Chadwick v. Broadwell*, 27 Id. 6; *Bank v. Bates*, 120 U. S. 564; and therefore that the failure to file the Donahoe bill of sale (mortgage) would not make it subject to the Downing mortgage, but that it was a prior lien if executed without fraud and with no agreement that it should be subject to said mortgage.
2. If the bill of sale was void for fraud, the subsequent arrangement constituted a pledge of the stock, and as such became a prior lien to the Downing mortgage (citing *Cooper v. Ray*, 47 Ill. 53; 3 Pars. Cont. 241, 271; Jones, Pledges, §§ 7, 28, 48, 364, 365); it not being claimed that such arrangement was made by Mrs. Sutherland or accepted by Mrs. Donahoe with any intention to hinder or delay creditors, both of whom must join in such fraudulent intent to make the transaction void; citing *Hill v. Bowman*, 35 Mich. 191; *Loomis v. Smith*, 37 Id. 595; *Jordan v. White*, 38 Id. 253; *Andrews v. Fillmore*, 46 Id. 315; *Beurmann v. Van Buren*, 44 Id. 499; *Olmstead v. Mattison*, 45 Id. 617; nor can it be regarded as a conveyance of all the property of Mrs. Sutherland, and therefore fraudulent because in fact a general assignment to one creditor in fraud of the rights of the other creditors, as the intention clearly appears that the the title should not pass to Mrs. Donahoe, who was to return the property to Mrs. Sutherland as soon as she had collected a specific amount from sales thereof.
3. In any case of doubt the law favors the presumption that the transaction is a pledge, rather than a conveyance; citing Jones, Pledges, § 14; and a delivery of property as security for a debt without a written conveyance cannot be a mortgage, but must be a pledge; citing Id. § 5.
4. If a mortgagee under a mortgage void as against creditors takes possession of the mortgaged property, and other property not included in the mortgage, under an agreement with the debtor that he should hold possession until the debt is paid, his title will be good as against subsequent attachments and execu-

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tions by other creditors, by virtue of the contract of pledge and possession under it; citing Jones, Pledges, § 12; *Rowley v. Rice*, 10 Metc. 7; *Blakeslee v. Rossman*, 43 Wis. 127; Wait, Fraud. Cov. § 357.

5. A discrepancy between the real amount owing and that set forth in a mortgage is a badge of fraud. If the statement be intentionally false, it is an act of direct fraud; citing *Hawkins v. Alston*, 4 Ired. Eq. 137; *Willison v. Desenberg*, 41 Mich. 156; *King v. Hubbell*, 42 Id. 597.

E. E. Osborn, for plaintiff, contended as stated in the opinion, and further:

1. A pledge is defined to be a deposit of personal property as security, with an implied power of sale upon default; citing Jones, Pledges, § 1. No one of the different phases stated by the defendant constituted any such relation. She did not claim that the property was to be in her possession to be held by her until a certain sum should be repaid her, and the only construction of her evidence would be that she was to have possession for Mrs. Sutherland, and in her name, using the money that she took in for the payment of certain of Mrs. Sutherland's debts.

CHAMPLIN, C. J. The plaintiff replevied a stock of millinery goods from defendant, claiming title and right of possession under a chattel mortgage executed by Mrs. J. Sutherland to her father, John T. Downing.

Kate Donahoe had sold to Mrs. Sutherland her stock of millinery for $1,450. It is claimed by plaintiff that Mrs. Donahoe, then Miss McKenna, had agreed to take $500 down, and Mrs. Sutherland was to have two years to pay the balance, if she needed it; that Mrs. Sutherland had no ready money wherewith to make the down payment, and requested assistance from her father; and that it was agreed that for advancing such sum her father should receive his pay out of the first proceeds of the business, and before Miss McKenna, now Mrs. Donahoe, should be paid. It is further claimed by the plaintiff that Mrs. Sutherland was unacquainted with the business, and that Miss McKenna promised to come into the store and

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assist during the busy season; and that she did so, and took more or less control over the business, and also assisted in the purchase of goods.

It is claimed by the defendant that soon after she sold to Mrs. Sutherland she obtained from her a bill of sale of the goods, which she held as security, but the same was not filed in the proper clerk's office until after the chattel mortgage was filed, under which the plaintiff claims. This mortgage bears date June 3, 1889, and it is claimed by plaintiff that it was given to secure the payment to Downing of the $500 which he advanced to his daughter when she purchased the goods. The mortgage was assigned to plaintiff on June 4, 1889, for $450. The mortgage was filed in the clerk's office, June 4, at 8 o'clock A. M., at which time the bill of sale had not been placed on file in the clerk's office. It was also claimed by Mrs. Sutherland that she never understandingly gave the bill of sale; that her signature was obtained by misrepresentation; and upon this point the testimony was conflicting.

The defendant claimed, and she introduced testimony which tended to prove, that she had purchased goods in Chicago for Mrs. Sutherland, and that her husband, Mr. Donahoe, had guaranteed the payment to the seller; that this bill amounted to something over $400, and the goods were placed in the stock in the store; that such guaranty was made necessary because the Chicago house refused to sell upon Mrs. Sutherland's credit. Defendant denies that she made any agreement when she sold the goods that Mr. Downing was to be paid out of the first proceeds of the sales by Mrs. Sutherland, or that he should be paid before the purchase price due her should be paid. She testified that she sold the goods upon the agreement that $500 was to be paid down, one-half of the balance of $950 at the close of the first season after the sale,

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which would end July 1, and the balance at the close of the next season's business, which would end about January 1, there being two seasons in a year in the millinery business; that, having purchased goods for Mrs. Sutherland guaranteed by her husband, she felt anxious that the business should be made to realize sufficient to pay for these goods and also the payment due her according to agreement; and that the arrangement was when she bought the goods that she should go into the store and stay there and assist Mrs. Sutherland until the bills were paid. In the month of May, she voluntarily went into the store and assisted Mrs. Sutherland in the business. After a little she took charge of the money received, and finally some dispute arose over money received, and defendant claims and testified, and in this she is supported by the testimony of her husband, that, on or about May 21, an agreement was made between her and Mrs. Sutherland, whereby Mrs. Sutherland surrendered to her the full possession and control of the goods and the business, and Mrs. Sutherland was not to have anything more to do with the goods or business until Mrs. Donahoe, in carrying on the business, had realized sufficient to pay the Chicago bill, and one-half the balance of the purchase money due her; that thereupon Mrs. Sutherland surrendered the store and goods to her, and left the store, and she took and had absolute possession under the arrangement; that she took possession both under the bill of sale and under the arrangement made last as aforesaid; and that she so continued in possession and carried on the business until the goods were seized under the writ. Mrs. Sutherland denies that such arrangement was made, or that she surrendered up possession of the goods to Mrs. Donahoe.

Under the conflicting testimony in the case, the jury had the difficult duty to perform of reconciling the testi-

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mony so as to be in harmony with the truth, as it should appear to them, if possible; if not possible, then to determine what facts were established by a preponderance of the testimony in plaintiff's favor upon the material points in issue. The circuit judge charged the jury, laying before them the respective claims and theories of the parties; and, in stating the plaintiff's claim, he said:

"They disagree as to another important element in the contract, which will be a question of fact for you to decide. Mrs. Sutherland, and the plaintiff acting through her, claim that a part of that agreement was this: That she informed Miss McKenna, now the defendant, Mrs. Donahoe, that she was to obtain $500 from her father, and that it was a part of the agreement then and there made at the time of the sale and transfer that she, Mrs. Sutherland, out of the proceeds of the sales of the property by the carrying on of the business, was to pay her father the $500 first, and that Miss McKenna's, now the defendant's, rights were to be subject to the payment of that five hundred dollars. This the defendant denies.

"Now I charge you, gentlemen, that if you find, from the evidence in this case, that the agreement was between these parties at that time that Mrs. Sutherland was to pay her father the $500 before paying the defendant, then the plaintiff is entitled to recover in this case; for the mortgage under which he claims the right to recover was one given by Mrs. Sutherland in pursuance of that agreement to her father, and by her father assigned to the plaintiff in this case, and he would succeed in that event to the rights of the father. Now that is a question of fact for you to determine."

The fourth assignment of error relates to this portion of the charge. The court later on charged the jury that the plaintiff had no greater rights than Mr. Downing would have had if he had not assigned the mortgage, and that the plaintiff did not occupy the position of a purchaser in good faith of negotiable paper; that the question of the *bona fides* of the transaction by which the mortgage was given and assigned was not in the case, but

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the plaintiff's right to replevin the goods depended upon the agreement testified to by Mrs. Sutherland, and embraced in that portion of the charge above given.

Was the instruction, as matter of law, correct? There was no agreement that Downing should have a lien upon the goods; none that he should be secured by mortgage upon the stock of goods; no agreement as to what time his advances should be paid; there was no agreement that he should have a mortgage payable in one year,—but a mere personal agreement that Mrs. Sutherland was to pay her father $500 before paying the defendant out of the proceeds of sales of the property in carrying on the business. Is this equivalent to an agreement to give her father a mortgage upon the stock of goods? One is a personal covenant, for which an action at law would lie, if broken, without any lien upon the goods; the other is a specific lien upon the goods, and places it in the control of the party to take possession at any time when he may deem himself insecure.

I do not think the agreement testified to was equivalent to an agreement to give a chattel mortgage, nor that the execution of the mortgage under which the plaintiff claims was given in pursuance of such agreement. The mortgage must stand and be determined by the relation of the parties at the time of its inception. It was given to secure the payment of an existing indebtedness, and whether it should have precedence over the rights of defendant must depend upon what her rights were. That she was in possession of the goods at the time of the replevin, there can be no doubt. She claims that she was in possession not only under the agreement of May 21, but also under her bill of sale, and that she obtained such possession by the consent of Mrs. Sutherland. Whatever rights she has, as against

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the plaintiff, must rest upon the right she had to take and hold possession. If she went into possession under her bill of sale, with the consent of Mrs. Sutherland, and was in such possession when the chattel mortgage was executed, then her rights are superior to mortgagee's, or his assignee's, and it makes no difference that the bill of sale was not on file. Jones, Pledges, § 12; Jones, Chat. Mortg. §§ 167, 168; *Cameron v. Marvin*, 26 Kan. 612, 629; *Pettee v. Dustin*, 58 N. H. 309.

If the stock of goods was placed in her actual possession and control, with the right of disposition to pay the Chicago debt and one-half of the debt due her, and such possession, control, and right of disposition were assented to by Mrs. Sutherland, previous to the execution of the mortgage, then she was a pledgee in possession, and her rights would be superior to a lien or mortgage created while she was in such possession. And this would be the law even if the bill of sale was void as having been obtained by fraud and imposition. The instructions as to the validity of the bill of sale having been obtained by fraud and misrepresentations were correct. If the jury should find it was so obtained, defendant cannot claim any rights under it, of possession or otherwise.

There must be a new trial, in which the plaintiff's rights will depend upon the rights of the assignee of a chattel mortgage given for an existing debt, and the existence of such debt will be open to inquiry. The defendant's rights will depend first upon the validity of her bill of sale as a security, and a possession taken thereunder by consent of Mrs. Sutherland, or, second, upon an agreement by which the goods were placed in her hands with the right of control and disposition until the Chicago debt and one-half of the debt owing to her

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by Mrs. Sutherland shall be paid, and her actual possession of the goods for that purpose at the time the mortgage was given.

The judgment must be reversed, and a new trial ordered.

CAHILL and LONG, JJ., concurred. MORSE and GRANT, JJ., did not sit.

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WILLIAM A. THOMPSON v. THE VILLAGE OF QUINCY.

Municipal corporations—Defective sidewalk—Pleading—Evidence—Charge to jury.

1. Evidence of the *fracture* of plaintiff's arm is admissible under a declaration averring that his arm and leg were "cut, sprained, bruised, wounded, and injured," and that he was "so injured in his said arm and leg as to permanently injure and cripple him for life."

2. Resolutions of a village council ordering the repair of a sidewalk, passed from time to time during the two years preceding the injury complained of, are admissible to show knowledge on the part of the village of condition of the walk, when accompanied by proof of its non-repair and of continued bad condition.

3. In such a case a witness for the plaintiff, who had testified to the bad condition of the walk prior to the accident, was asked to state how or in what manner he had discovered its condition, and answered that the boards were loose, and jiggled under his feet, and that he stumbled on the boards, and had seen others stumble, but without falling down. And it is held that both the question and answer were competent, the question not necessarily opening the door to collateral issues, and falling within the spirit of the rule adopted in *Smith v. Sherwood Township*, 62 Mich. 159.

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4. It is highly proper, and oftentimes the duty of the trial judge in his charge, to refer to and comment upon the statements of the counsel in their arguments, and he who objects to such comments must show by the record that he has been misquoted.

Error to Branch. (Loveridge, J.) Argued October 21, 1890. Decided November 14, 1890.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

W. H. Lockerby (*H. H. Barlow* and *John B. Shipman*, of counsel), for appellant.

F. A. Lyon and *Milo D. Campbell*, for plaintiff.

GRANT, J. Plaintiff recovered verdict and judgment for injuries sustained by reason of a defective sidewalk of the defendant village. The negligence alleged is that the sidewalk—

"Was out of repair, rotten, loose, rickety, dangerous, dilapidated, and unsafe for public use and travel, and the boards therein and composing the same had become loose, rotten, broken, torn up, and defective, so that they were then and there liable to turn over, tip up, and trip up pedestrians while passing over it."

The declaration also alleged notice on the part of defendant, and neglect to repair.

Four assignments of error are relied upon.

1. In describing the injury, the declaration alleges that—

"The arm and leg of the plaintiff were then and there greatly hurt, cut, sprained, bruised, wounded, and injured, * * * and the said plaintiff was also then and there so injured in his said arm and leg as to permanently injure and cripple him for life."

The plaintiff testified, under objection, that his arm was

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broken by the fall. It is insisted that the declaration was not sufficiently specific to admit proof of the fracture, and that this case is within *Shadock v. Plank-road Co.*, 79 Mich. 7. The allegation in that case was that the plaintiff was hurt, bruised, and wounded. It was held that the allegation was not so specific as to admit evidence of fractures of shoulder, arm, and hand. Mr. Justice CAMPBELL said it "gave no description of the place or extent of these injuries." The present declaration is not subject to this criticism. It describes both the place and the extent of the injury. The rule contended for by defendant's counsel would require unreasonable strictness in pleadings. The objection was properly overruled.

2. Plaintiff gave in evidence several resolutions of the common council for about two years previous to the accident ordering the sidewalk to be repaired. This was objected to as being too remote. The sole purpose of the testimony was to show *knowledge* on the part of defendant of the condition of the walk. They were admissible for that purpose, when accompanied by proof that the repairs had not been made, and that the walk continued in bad condition. This testimony was therefore properly admitted.

3. A witness, who had testified in regard to the condition of the walk, was asked by plaintiff's counsel—

"You may state how you have discovered, or in what manner you have discovered, its bad condition prior to the accident.

"*A.* It was loose, and jiggled under my feet. The boards being loose, I experienced trouble, and stumbled on the boards, but never fell. I have seen people stumble in that way, but no one fell down."

Both the question and answer were competent. The question did not necessarily open the door to collat-

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eral issues It is within the spirit of the rule adopted in *Smith v. Sherwood Tp.*, 62 Mich. 159.

4. The court said in its charge to the jury:

"The defendant on its part admits, and its counsel have admitted in their argument to you, and it has been admitted in the case, that in the spring of that year, 1888, this particular piece of sidewalk was out of repair."

The record does not contain the arguments of counsel to the jury. We cannot, therefore, assume that defendant's counsel did not make such an admission. When the trial judge refers in his charge to the jury to the statements of counsel, we must assume that he correctly quotes them in the absence of a contrary showing. Counsel do not appear to contradict the fact, but content themselves by saying that the statement of the judge is not supported by the record. It is highly proper, and oftentimes the duty of the trial judge in his charge, to refer to and comment upon the statements made by counsel in their arguments. He who objects to such comments must show by the record that he has been misquoted. Only when such statements are misrepresented or misstated does the court commit an error.

Judgment affirmed, with costs.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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NINA L. WALES AND JULIA D. SUMMERS v. THOMAS TEMPLETON.

Will—Construction—Description of lands.

1. This case involves the construction of certain devises in a will, and the following rules of construction are held applicable:
   a—The plain intent of the testator as evinced by the language of the will must prevail.
   b—Such intent must be gathered from "the four corners of the instrument."
   c—The construction is not to be varied by events subsequent to the execution of the will.
   d—A gift by words of general description is not to be limited by a subsequent attempt at a particular description, unless such appears to have been the intention of the testator as gathered from the whole will.
2. An examination of the opinion, and of the plat incorporated therein, is essential to a full understanding of the facts of this case.

Error to Macomb. (Canfield, J.) Argued October 23, 1890. Decided November 14, 1890.

Ejectment. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Franklin P. Monfort (*T. M. Crocker*, of counsel), for appellants, contended as stated in the opinion.

Bowen, Douglas & Whiting (*Eldredge & Spier*, of counsel), for defendant, cited no authorities.

GRANT, J. Plaintiffs bring their action of ejectment, as the heirs at law of Henry A. Wales, deceased, for the recovery of the W. ½ of S. W. ½ of the N. E. ¼ of section 20, in township 1 N., range 13 E., in the county of Macomb.

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Henry A. Wales derived his title by will from Austin Wales, who derived his title to a portion of the lands referred to in his will from one Ami Wales. Ami Wales devised all her real estate (except five acres to her son), to her husband, Austin Wales. She owned the E. ½ of the E. ½ of the N. W. ¼ of said section 20. The devise to her son was in the following language:

"I give, bequeath, and devise to my son Henry A. Wales five acres of land including the site of his present homestead, to be apportioned and set off from the remainder of my real estate in such form and manner as my executor and husband, Austin Wales, shall choose; together with the hereditaments, rights, appurtenances thereunto belonging, or otherwise appertaining."

The specific devises of land by Austin Wales are as follows:

"1. My son Henry A. Wales shall have 26 acres out of 40 acres on the east half where his residence is at present, on the east half of the east half of the north-west quarter of section 20, town 1 north, of range 13 east, and bounded on the west by lands of William Fisher, on the south by my land and his line heretofore deeded to him, on the north on sec. line, also by lands of A. Weithof and H. Genitz, far enough to make up 26 acres of land. Also my son Henry A. Wales shall have 20 acres joining the above, and bounded by lands of James Martin, and sec. road on the north, and running on said sec. road south-east forty rods, and eighty rods south-west, containing twenty acres more or less.

"2. Jennett S. Wales, the wife of my son Darwin J. Wales, deceased, shall have 25 acres of land, including my residence and all the buildings thereon, said 25 acres shall commence and bounded as follows: On the west, by lands owned by William Fisher, and on the north joining the lands of my son Henry far enough east to make up twenty-five (25) acres of land,—during her natural life-time. After deceased's death, the above twenty-five acres of land shall be equally divided among the living heirs. Further, Jennett S. Wales also shall have all my household furniture and wearing apparel, as well as all my

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personal property, whatsoever, for her own use ad benefit, and do with the same what she thinks best.

"3. Mary Ready shall have fifteen acres joining the above-described land of Jennett S. Wales on the south, running east on half section road fifteen (15) rods, containing fifteen acres of land, forever, all in town of Erin, Macomb county, Michigan (section No. 20)."

The will then provided for the sale of the balance of the real estate for the payment of his debts and certain bequests, after which the remainder of the proceeds of the sale was to be divided among the children of his son. It is evident that the scrivener who drew this will was totally unfamiliar with the use of language required to describe the different parcels of land accurately, or to convey clearly the will of the testator. Plaintiff's counsel are correct in their statement of the rules of construction applicable to the case, which are these:

1. The plain intent of the testator as evinced by the language of the will must prevail.
2. The intent of the testator must be gathered from "the four corners of the instrument."
3 The construction is not to be varied by events subsequent to the execution.
4. A gift by words of general description is not to be limited by a subsequent attempt at a particular description.

This fourth rule is, however, subject to this qualification, that the particular description must prevail if such appears to be the intention of the testator from the whole will. It does not appear that the apportionment to Henry A. Wales of the five acres devised to him by his mother was ever made otherwise than by inclosing a rectangular piece containing that number of acres, fronting on a highway known as the "Gratiot Road," with side lines running at right angles to the highway. On following page is diagram of the situation of these lands.

The parcels of land marked "A," "B," "D," "E,"

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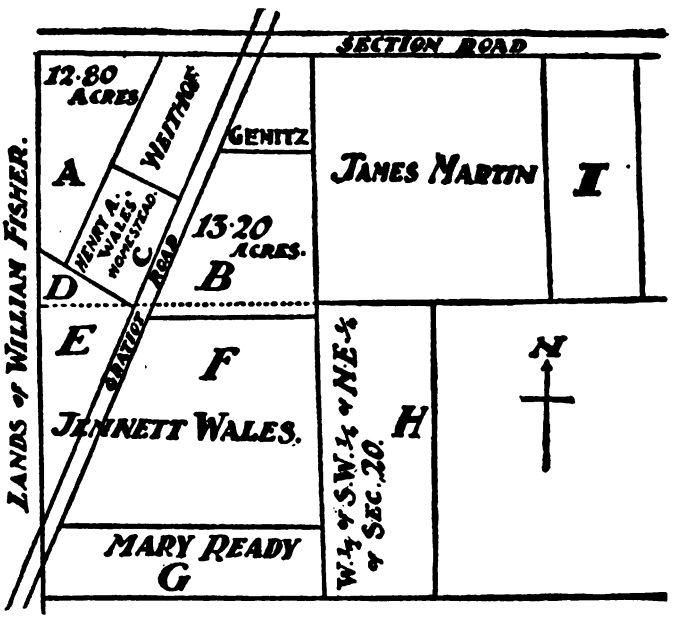

"F," "G," "H," and "I," together with other lands east of parcels H and I, represent the lands of Austin Wales at the time the will was made. He had just 26 acres north of the south line of the N. E. ¼ of the N. W. ¼ of section 20. His land bounded the homestead of Henry A. Wales upon three sides. The dotted line upon the diagram represents the south line above mentioned. If he devised to Henry the 26 acres north of this line, then the land in controversy, marked "H," would not join the land first devised; it would only corner upon it. It is claimed on the part of the plaintiffs that the triangular piece D is included in the devise to Jennett Wales, and therefore, in order to make the 26 acres devised to Henry, a narrow strip must be taken from the S. E. ¼ of the N. W. ¼. This construction is necessary in order to make the land in dispute join the first parcel devised to Henry. It is unnecessary to determine this question, for, aside from this, we think the

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intention of the testator is clear, and that the word "joining" cannot prevail against the other description by metes and bounds.

It appears conclusively that Austin Wales was a man of business and intelligence, and that he was thoroughly familiar with the situation of his lands, having lived there a great many years. There is no claim that he was not at the time he made his will in the full enjoyment of his faculties. We must assume, therefore, that when he executed the will he understood that the 20 acres devised to Henry was "bounded by lands of James Martin, and section road on the north, and running on said section road forty rods." No other piece of his land than one bounded on the north by this section road complies with this description. This particular description by metes and bounds must control. The circuit judge was therefore correct in instructing the jury to render a verdict for the defendant.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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EDWIN E. BENEDICT v. JOHN TORRENT ET AL., AND JOHN TORRENT ET AL. v. EDWIN E. BENEDICT (CROSS-BILL).

Tenancy in common—Sale of interest in timber—Partition.

1. One tenant in common of lands cannot, under the law of this State, convey his interest in the timber on said lands, and thereby make the other tenants in common co-tenants with his grantee in said timber.
2. The only interest which such a grantee takes is the interest in

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the timber upon such of the land as in partition proceedings shall be set off to his grantor, which partition must be made of the *entirety* of the estate according to the shares held by each tenant, after which the grantee will be entitled to all of the rights secured by his conveyance.

3. The following propositions are summarized from the opinion of Mr. Justice GRANT:

a—The law, common and statutory, has always most carefully protected the owners of land in the inherent right to preserve and enjoy it as they desire, of which right they can only be deprived on the ground of public necessity, by sale upon execution, and in certain cases of partition.

b—The partition statute (How. Stat. § 7882) provides that if the commissioners report that the land held in common cannot be divided without *great* prejudice to the owners, and if the court shall be satisfied that such report is just and correct, it may order a sale; but if any portion of the lands can be divided without *great* prejudice, it must be partitioned, and only the remainder sold.

c—A tenant in common cannot commit waste upon the common lands, and if he does he is subject to an action on the case, and must respond in damages: and to cut and remove timber from unoccupied lands is waste.

d—It is well settled that where one tenant in common conveys to a stranger any but an undivided interest in the *whole* of the land, where such interest is prejudicial to the rights of his co-tenants, such conveyance is void as to them. When partition of the lands is had between the co-tenants, courts may properly consider such conveyance in partitioning the lands so as to secure the interest of such purchaser.

Appeal from Manistee. (Judkins, J.) Argued October 23, 1890. Decided November 14, 1890.

Original bill filed to enjoin the cutting and removal of timber by the defendants, who filed a cross-bill praying that they be decreed the owners of an undivided part of the timber, with the right to cut and remove the same, and, if necessary, that partition might be made thereof. Decree dismissing original bill, and adjudging the parties tenants in common of the timber, which is decreed to be sold and the proceeds divided, reversed, and injunction

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granted as prayed for. The facts are stated in the opinion.

Ramsdell & Benedict, for complainant.

Niskern & Withey, for defendants.

GRANT, J. The bill in this case is filed by complainant, Benedict, to enjoin the defendants from cutting and removing the timber from the lands described therein, about 1,100 acres. He avers that he is the owner in fee of the lands, sets forth his chain of title, alleges that defendants set up a claim to the timber upon the lands by virtue of a pretended conveyance thereof to them by some of complainant's grantors, and that they threaten to cut and remove the timber.

The answer admits complainant's title to the land, but claims that the defendants own the undivided 23-24 of the timber growing thereon, and that they have a right to cut and remove the same; admits that complainant owns the other undivided 1-24, and alleges that complainant had notice of their purchase. Defendants also filed a cross-bill, in which they set up this conveyance, the record of it in the miscellaneous records of the county of Manistee, notice on the part of complainant, Benedict, of the purchase, and pray that they may be adjudged to be the owners of said 23-24 of the timber; that they may cut and remove it at any time prior to May 4, 1897; and, if necessary, that a partition of the timber may be decreed. It is unnecessary here to set forth the answer to the cross-bill.

The case was heard upon pleadings and proofs taken in open court, and a decree rendered dismissing the original bill, and adjudging that complainant and defendants owned the timber as tenants in common; that the timber be sold at public auction under the direction of

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a commissioner of the court; that the commissioner execute deeds to the purchasers at the sale; that said purchasers have the right to enter upon the lands, and cut and remove the timber within such time as shall be reasonable and just; and that, after paying all costs and expenses, the proceeds be divided between the complainant and defendants, 23-24 to the one, and 1-24 to the other.

In order to ascertain what rights these parties have, it is unnecessary to trace the title beyond the date of the conveyance under which the defendants claim. This conveyance was dated May 4, 1887. It purported to grant and convey to the defendants, their executors, administrators, or assigns, "all the timber now standing and being upon the following described lands," with license for the term of 10 years to enter upon the lands, and to cut and remove the timber, all the timber not so cut and removed during the term to belong to the parties of the first part. This instrument was executed by Harry Mee and Anna L. Seymour, and was duly acknowledged, and recorded in the miscellaneous records of Manistee county, on the day it bears date. It was not recorded upon the record of deeds. At that date the title to the land stood as follows: 12-24 in Frank B. Pease; 11-24 in Harry Mee and Anna L. Seymour; 1-24 in George A. Hart. Frank B. Pease had on April 29, 1887, executed an instrument to Harry Mee, purporting to bargain, sell, and deliver unto him "all the goods, chattels, and property, to wit, all his interest in and to the timber on the premises described as follows" (giving the same descriptions above referred to). It also gave him the license for 10 years to enter upon the lands, and cut and remove the timber. This instrument was also recorded on May 4 in the miscellaneous records of Manistee county.

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By subsequent deeds of conveyance, duly executed and recorded, complainant, Benedict, obtained the entire title in fee to these lands. None of these deeds contained any reservation of the timber, nor any reference whatever to the timber purchase by the defendants. The lands are wild, unoccupied, and chiefly valuable for timber of various kinds.

It is insisted by the defendants that under the conveyances from Pease to Mee, and from Mee and Seymour to them, they are the owners of 23-24 of the timber, while the complainant contends that they are at most the owners of 11-24. In view of the final disposition of the case, it becomes unnecessary to determine this question. At the time of these conveyances, Hart was a tenant in common of the land, and complainant, Benedict, succeeded to his rights by deed. The rights of tenants in common are therefore involved, and by the law of tenancy in common they must be determined. It is therefore important to consider the statutes of this State upon this subject.

The statute makes provision for the partition of lands held in common. One tenant in common may present his petition to the circuit court in chancery praying for a partition. Commissioners are appointed, whose duty it is to divide and allot the several shares and portions to the respective parties. If the lands can be divided, this must be done. No authority to sell when partition can be had is given. The law, common and statutory, has always most carefully protected the owners of land in their right to preserve and enjoy it as they desire. This is an inherent right of which they can only be deprived on the ground of public necessity, by sale upon execution, and in certain cases of partition. This partition statute further provides that if the commissioners report that the lands held in common cannot be divided without great

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prejudice to the owners, and if the court shall be satisfied that such report is just and correct, it may then order a sale; but if any portion of the lands can be divided without great prejudice to the owners, it must be partitioned, and only those portions sold which cannot be divided. How. Stat. § 7882. It is not sufficient under this statute that the lands cannot be divided without prejudice. Great prejudice must exist in order to warrant a sale. It is therefore entirely clear that the only decree which the court could render in partition proceedings would be a division of these lands as an entirety between the tenants in common, because no difficulty whatever exists in effecting a division.

A tenant in common cannot commit waste upon the common lands. If he does, he is subject to an action on the case, and must respond in damages. How. Stat. § 7942. To cut and remove timber from unoccupied lands is waste.

Defendants did not by their purchase become tenants in common of the land. They did not purchase a moiety, but only a specific part of the moiety of their grantors, with license to enter and remove what they had purchased. Their grantors could not cut and remove the timber. Upon what legal principle can they obtain rights which their grantors did not possess? It is well settled that they could not become purchasers from Mee and Seymour of any interest in the land to the prejudice of the other co-tenants. This is so well settled both by authority and reason as to render citations unnecessary. The statutes above referred to plainly say that neither Hart nor his grantee could be compelled to part with his land or any interest therein by a sale. I think it also well settled that where one tenant in common conveys to a stranger any but an undivided interest in the whole of

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the land, where such interest is prejudicial to the rights of his other co-tenants, such conveyance is void as to them. When partition of the lands is had between the co-tenants, courts may properly consider such conveyance in partitioning the lands so as to secure the interest of such purchaser. This has been done in cases where one tenant in common has assumed to convey to a stranger a particular portion of the common property by metes and bounds.

The theory of the defendants is that, by the conveyance by Mee and Seymour to them, a new tenancy in common was created, and Hart, Pease, Mee, and Seymour were tenants in common of the land, and Hart and the defendants were made tenants in common of the timber. If this were so, then Mee and Seymour might have sold and conveyed the gravel beds, deposits of clay, stone quarries, and deposits of ore, if any existed upon the lands, and thereby have created so many new tenancies in common, and their grantees could have forced a sale of each interest as against the other co-tenants. Not only, therefore, may such a conveyance operate to the prejudice of those tenants in common who are not parties to it, but the inevitable result, as in this case, would be the substantial destruction of their landed estate.

The question here involved is new in this State, and we are able to find but one case in point in other courts, viz., *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. In that case, one tenant in common had conveyed by deed an undivided one-half of the iron, zinc, and other ores in certain lands. The question arose upon a bill for partition by a purchaser of this interest. As in this case, so in that, the grantor who had conveyed the one-half of the iron and zinc had also conveyed the fee of

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the land, and the defendant was then the owner of the entire fee. The title as to said co-tenant was held void, and the bill dismissed.

Our conclusion is that one tenant in common cannot, under the law of this State, convey his interest in the timber, and thereby make the other tenants in common co-tenants with his grantee. The only interest which such a purchaser takes is the interest in the timber upon such lands as in partition proceedings shall be set off to his grantor. Such partition must be made of the entirety of the estate according to the shares held by each. When this is done, the purchaser of the timber would be entitled to all the rights secured by his conveyance. The cross-bill in this case is filed for the sole purpose of effecting a partition of the timber. It is not framed to obtain a partition of the entire estate. Whether the defendants can now maintain such a bill is not now before us, and we express no opinion thereon.

The decree of the court below must be set aside, decree entered granting an injunction as prayed in the original bill, and the cross-bill dismissed, with the costs of both courts.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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THE FIRST NATIONAL BANK OF MAUCH CHUNK v. WILLIAM DWIGHT ET AL.

Judgment creditors' bill—Execution—Issuance—Return.

1. In order to warrant the filing of a judgment creditors' bill under How. Stat. § 6614, an execution must have been *delivered* to the proper officer at least 20 days *before*, and have remained in his hands *until*, the return-day, and have been returned by him unsatisfied.

2. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

a—By How. Stat. § 7664*a*, executions may be made returnable in not less than 20 nor more than 90 days from their issuance.

b—A judgment creditors' bill will not be retained if filed before the return-day of the execution, nor if the execution is returned before the return-day.

c—Under the decisions of this Court, the debtor is entitled to have the execution remain in the hands of the sheriff from the time of its delivery to him until the return-day.

d—An execution cannot be considered as being issued until it is placed where it might have been executed, and some efficient act done under it.

Appeal from Wayne. (Reilly, J.) Argued October 24, 1890. Decided November 14, 1890.

Judgment creditors' bill. Defendants Wilson, Luther, and Wilson appeal from decree overruling demurrer. Reversed, and bill dismissed. The facts are stated in the opinion.

Wisner, Speed & Harvey (*John J. Speed*, of counsel), for complainant, contended:

1. It is sufficient if the complainant appears in good faith to have endeavored to collect its judgment by legal process (citing *Cassidy v. Meacham*, 3 Paige, 311; *Child v. Brace*, 4 Id. 309), so as to show thereby that his remedy at law has failed; citing

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Waterman v. Cochran, 12 Vt. 707; and see also argument of counsel for plaintiff in error in *Pharis v. Leachman*, 20 Ala. 666; *Dana v. Banks*, 6 J. J. Marsh. 220.

William O. Webster, for appellants, contended for the doctrine of the opinion.

GRANT, J. The complainant obtained a judgment in the Circuit Court of the United States for the Eastern District of Michigan, and on November 12, 1889, sued out two writs of execution directed to the marshals of the Eastern and Western Districts of Michigan, returnable December 4 following. The writs were delivered to the respective marshals November 16, and returned December 4, *nulla bona*. Including the day of delivery and the return-day there were 19 days within which the marshals might have levied. The reason for the issuance of two writs was that some of the defendants lived in the Eastern and some in the Western Districts. After the returns of the marshals were filed, complainant filed a judgment creditors' bill setting forth the above facts and other averments necessary to sustain such a bill. Defendants demurred on the ground that the court had no jurisdiction, because complainant had not exhausted its remedy at law by the issue and return of the executions unsatisfied. The demurrer was overruled, and defendants appeal.

The statute authorizing such suits provides that whenever an execution against a judgment debtor shall have been issued, and returned unsatisfied in whole or in part, the parties suing out such execution may file a bill in chancery, etc. How. Stat. § 6614. By statute, executions may be made returnable at any time not less than 20 nor more than 90 days from the time such execution shall be issued. How. Stat. § 7664*a*. A judgment creditors' bill will not be retained if filed before the

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return-day of the execution, nor if the execution is returned unsatisfied before the return-day. The cases all hold that a creditor must, in good faith, have exhausted his remedy at law before he can maintain the suit. *Freeman v. Bank,* Walk. Ch. 62; *Steward v. Stevens,* Har. Ch. 169; *Smith v. Thompson,* Walk. Ch. 1; *Thayer v. Swift,* Har. Ch. 430; *Beach v. White,* Walk, Ch. 495; *Tarbell v. Millard,* 63 Mich. 250.

The question here involved has never before been presented to this Court. Judgment debtors are entitled to have their property levied upon and sold before they can be harrassed by this proceeding. It has, consequently, been held that where an execution was issued to the sheriff of one county, and returned *nulla bona,* the bill will be dismissed upon proof that the debtor had property in another county which was known to the complainant. Under the above decisions, the debtor is entitled to have the execution remain in the hands of the sheriff from the time of its delivery to him till the return-day. The law says that the execution must issue at least 20 days before the return-day. It cannot be considered as being issued until it is placed where it might have been executed, and some efficient act done under it. It must be issued to the sheriff or other proper officer. How. Stat. § 7664. The officer is the only one who can do such efficient act. The attorney who takes out the writ can do nothing under it. Consequently this writ was not issued 20 days before the return-day. *Van Vechten v. Paddock,* 12 Johns. 178; *Bronson v. Earl,* 17 Id. 63; *Visscher v. Gansevoort,* 18 Id. 496; *Ross v. Luther,* 4 Cow. 158; *Isabelle v. Iron Cliffs Co.,* 57 Mich. 120.

There it as much probability that the officer will find property upon which to levy during the first days of the life of the execution as during the last days. If the writ

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may issue one day less than the 20, it may as well issue 19 days less than the 20, and be, in fact, issued and returned the same day. If the law will not permit the officer to return the writ before the return-day, and allow it to slumber in the files of the court until after that day has passed, for the same reason it will not permit it to slumber in the hands of the plaintiff or his attorney during the first days of the 20. The complainant cannot be said to have exhausted his remedy at law in the one case any more than in the other. It is not a question of good faith, but a question of jurisdiction.

The decree must be reversed, with the costs of both courts, and the bill dismissed.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

THE SECOND NATIONAL BANK OF MAUCH CHUNK v. WILLIAM M. DWIGHT ET AL.

[See *ante*, 189.]

Creditors' bill.

This case is ruled by the opinion in *First National Bank of Mauch Chunk v. Dwight*, *ante*, 189.

Appeal from Wayne. (Reilly, J.) Argued October 24, 1890. Decided November 14, 1890.

Judgment creditors' bill. Defendants Wilson, Luther, and Wilson appeal from decree overruling demurrer.

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Reversed, and bill dismissed. The facts are stated in *First National Bank v. Dwight, ante,* 189.

Wisner, Speed & Harvey (*John J. Speed,* of counsel), for complainant.

William O. Webster, for appellants.

GRANT, J. The facts in this case are the same as in *First National Bank of Mauch Chunk v. Dwight, ante,* 189, and the proceedings there had were the same.

Decree reversed, with the costs of both courts, and bill dismissed.

CHAMPLIN, C. J., MORSE and CAHILL, JJ., concurred. LONG, J., did not sit.

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FRANCES W. COX v. THE COMMISSIONER OF HIGHWAYS OF THE TOWNSHIP OF HARTFORD.

Highways—Proceedings to establish—Application—Notice—Determination of commissioner.

1. Proceedings to discontinue a highway, and lay out a new one, and build a bridge cannot be united in one proceeding.
2. The statute requires ten *full* days' notice of the hearing by the commissioner of a petition to lay out a highway. How. Stat. § 1298.
3. Proceedings for laying out a highway are void unless the commissioner's return shows that he determined the necessity for such action.

Certiorari to review proceedings laying out a highway.

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Argued October 30, 1890. Proceedings quashed November 14, 1890. The facts are stated in the opinion.

Titus & Tuttle, for petitioner.

GRANT, J. *Certiorari* to commissioner of highways. The proceedings in this case are void for the following reasons:

1. The petitioners in their petition to the highway commissioner prayed for the discontinuance of one highway, for the laying out of a new highway, and for the building of a new bridge. These objects cannot be united in one proceeding. *Shue v. Highway Com'r,* 41 Mich. 638.

2. The time intervening between the date of notice and the day of hearing is insufficient. The statute requires 10 full days' notice. The notice in this case was dated May 9, 1890, and the hearing fixed for May 19. *Platt v. Highway Com'r,* 38 Mich. 247.

3. There is no proof of any service upon the owner of the land.

4. There was no determination by the commissioner that there was any necessity for laying out the highway.

The proceedings must be quashed, with costs to petitioner.

The other Justices concurred.

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JAMES M. KING v. ALFRED WELBORN ET AL.

Homestead—Premises occupied for hotel purposes—Tenancy in common.

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1. The homestead exemption secured by How. Stat. § 7721, may be claimed in premises occupied by the owner *exclusively* for hotel purposes, if his family reside therein and have no other residence or home.
2. Where a land-owner constructs his house, which he occupies as a homestead, upon two lots, he is not thereby deprived of his statutory exemption. If the property comprising the homestead is worth more than $1,500, the statute provides a way by which he may receive the value of his exemption, and his creditors the remainder to apply on his debts.
3. A *verbal* promise to give a security cannot create a mortgage lien upon the homestead of the promisor.
4. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

   a—It is well settled in this State that a homestead can be claimed by a tenant in common; citing *Shepard v. Cross*, 33 Mich. 98; *Lozo v. Sutherland*, 38 Id. 168; *Sherrid v. Southwick*, 43 Id. 518; *Tharp v. Allen*, 46 Id. 389; *Cleaver v. Bigelow*, 61 Id. 47; *Kruger v. LeBlanc*, 75 Id. 424.

   b—A homestead can be claimed upon premises used partly for business purposes and partly as a dwelling; citing *Orr v. Shraft*, 22 Mich. 260; *Skinner v. Shannon*, 44 Id. 87; *Stanton v. Hitchcock*, 64 Id. 328.

Appeal from St. Joseph. (Loveridge, J.) Argued October 30, 1890. Decided November 14, 1890.

Bill to foreclose a mortgage. Defendant Welborn appeals from an order directing the payment to the petitioner, defendant Pratt, of one-half of the surplus realized on a sale of the premises. Affirmed. The facts are stated in the opinion.

S. M. Constantine, for petitioner.

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Howell, Carr & Barnard, for appellant, contended:

1. When property is principally and chiefly used as a hotel or for business purposes, it would be doing violence to the statutes to regard it as a homestead; citing *Laughlin v. Wright*, 63 Cal. 113; *Green v. Pierce*, 60 Wis. 372; *Geney v. Maynard*, 44 Mich. 578; *Philleo v. Smalley*, 23 Tex. 498.
2. In determining whether a building claimed as a homestead is exempt as such, the question is whether its principal use is that of a residence for the debtor and his family, and especially whether in its architecture it was designed exclusively or properly as a residence; citing Thomp. Home. § 137; *Dyson v. Sheley*, 11 Mich. 528; *Rhodes v. McCormick*, 4 Iowa, 374; *Ackley v. Chamberlain*, 16 Cal. 183; *Gregg v. Bostwick*, 33 Id. 228; *Mann v. Rogers*, 35 Id. 319; *In re Noah*, 73 Id. 590.
3. While it has been held that homestead rights may be acquired in property owned in common, those were cases where the property claimed was confined to the statutory amount and character, and where the owners were either husband and wife or parent and child.

GRANT, J. Upon the foreclosure of a mortgage executed by the defendants April 6, 1882, the surplus in excess of the amount due, including costs, was $1,375.50. Defendant Jacob A. Pratt thereupon filed a petition claiming one-half of this amount, and asking that it be decreed to him. The defendant Welborn answered said petition, and interposed two objections to petitioner's claim:

1. That he owned the land by virtue of a sheriff's sale upon execution, and deed in pursuance thereof.
2. That he holds an equitable lien upon the fund as against the petitioner.

The defendants Alfred Welborn and Jacob A. Pratt were tenants in common of the premises, which are described as lots 1 and 2 in block 48, and also lot 21 in block 49½, in the village of Three Rivers. Upon lots 1 and 2 was a three-story building used as a hotel, and a two-story wooden building in the rear used as a dwelling-house, and a barn upon lot 21 used in connection with the hotel. They

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and their wives executed the mortgage in question. Welborn leased to Pratt his undivided half of the premises for an annual rental. Pratt, his wife and daughter, carried on the hotel from 1882 till the property was sold upon the mortgage, in 1889. They lived in the hotel, had no other residence or home, and no land or other property out of which to construct a homestead. When the sheriff levied upon the property, defendant Pratt gave him a verbal and written notice that he claimed a homestead in it. This claim was disregarded, and the property sold by the sheriff without any regard to the homestead. The rights of the parties have, by the foreclosure sale, been transferred from the land to the money realized upon the sale in excess of the amount due. If the petitioner had homestead rights, then the execution sale was void, and he is entitled to one-half the surplus, which was accorded to him by the decree of the court below. His right to a homestead is denied, because it is claimed that the property was of such a character and description as not to permit homestead rights being claimed therein.

It is well settled in this State that a homestead can be claimed by a tenant in common. *Shepard v. Cross*, 33 Mich. 98; *Lozo v. Sutherland*, 38 Id. 168; *Sherrid v. Southwick*, 43 Id. 518 (5 N. W. Rep. 1029); *Tharp v. Allen*, 46 Id. 389 (9 N. W. Rep. 443); *Cleaver v. Bigelow*, 61 Id. 47 (27 N. W. Rep. 851); *Kruger v. Le Blanc*, 75 Id. 424 (42 N. W. Rep. 853). It is equally well settled that a homestead can be claimed upon premises used partly for business and partly as a dwelling. *Orr v. Shrâft*, 22 Mich. 260; *Skinner v. Shannon*, 44 Id. 87 (6 N. W. Rep. 108); *Stanton v. Hitchcock*, 64 Id. 328 (31 N. W. Rep. 400). Any reference to the authorities of other states upon these points is unnecessary.

But it is insisted that this building was occupied by petitioner and his family for the sole purpose of con-

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ducting a hotel, and that therefore no homestead right attached. We cannot agree with this contention. The adoption of this doctrine would be in plain defiance of the statute, and render it nugatory as to those engaged in the business of hotel keeping. The benefits of this statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel keepers from the benefits of the act. Of the authorities cited by counsel for defendant Welborn, only one contains language which can be construed into a support of their position, viz., *Laughlin v. Wright*, 63 Cal. 113. The language of that decision must, however, be construed with reference to the facts. The declaration claiming a homestead was made May 25, 1874. In August, 1874, the defendant Wright and his family left the hotel, put it in other hands, and resided elsewhere. But if it should be found to fully sustain defendant's contention, we cannot adopt it as the law of this State.

In *Green v. Pierce*, 60 Wis. 372 (19 N. W. Rep. 427), the defendant, who claimed a homestead right, owned only a leasehold interest in the premises, and by the very terms of his lease it was provided that the premises should be used only as a hotel and eating-house, and upon this ground alone the right to the homestead was denied.

Defendant also insists that the statutory homestead is limited to one lot, and that this property covered two lots; hence, that no homestead could be claimed without a selection and designation of some portion as such. This is too narrow and technical a construction to place upon this beneficial statute. One who has constructed his house, which he occupies as a homestead, upon two lots, is not thereby to be deprived of his exemption. If

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the property comprising his homestead is worth more than $1,500, the statute provides a way by which he may receive the value of his exemption, and his creditors the balance to apply on his debts.

Defendant Welborn also claims that he has an equitable lien upon this money, because he says that Pratt promised to secure him by a mortgage upon the hotel property for debts due him from Pratt; that at the time they purchased the hotel property, each taking an undivided one-half, he (Welborn) paid a part of a mortgage given by Pratt, secured the balance, and discharged a mortgage which he himself had upon certain other hotel property; and that Pratt then promised that he would secure him by mortgage upon the hotel property in question at any time he felt insecure or wanted it. This claim is expressly denied by both Mr. and Mrs. Pratt, and we find nothing in the record to show a preponderance of evidence in favor of Welborn. But, aside from this, a verbal promise to give security cannot create a mortgage lien upon the homestead. Such holding would be in direct violation of the statute.

The decree of the court below, giving one-half of the surplus to the petitioner, must be affirmed, with costs of both courts.

The other Justices concurred.

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WILLIAM H. KNICKERBOCKER v. LUTHER T. WILCOX.

Principal and agent—National bank—Contract—Liability of cashier—Judgment—Evidence.

1. The cashier of a *national* bank wrote a letter to the cashier of a bank in a neighboring state stating, in effect, that, if he would sign a bond for customers of the writer's bank to enable them to commence a replevin suit, "we will stand between you and all harm," which letter he signed officially. And it is held that the agreement was one which the national bank had no power to enter into, and that it cannot be said that the letter, upon its face, appears so clearly to have been intended as the undertaking of the bank, executed through the writer as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties.
2. The judgment record in a suit upon a replevin bond brought in the state of Indiana showed a copy of the bond set out at length in the complaint, as the only cause of action relied on; and it is held that it will be presumed in support of the judgment that it was rendered after due proof of the execution of the bond declared on.
3. Where a paper is beyond the jurisdiction of the courts of this State, its contents may be shown by secondary evidence.
4. Whether a judgment was secured by fraud and collusion is a question to be submitted to the jury under proper instructions,

Error to St. Joseph. (Loveridge, J.) Argued October 30, 1890. Decided November 14, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Howell, Carr & Barnard, for appellant, contended:

1. Bellam & Handy, being parties to the judgment introduced in evidence, are precluded from disputing the grounds upon which

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they were rendered; citing *Pierson Township v. Township Board*, 49 Mich. 224; *Mitchell v. Chambers*, 43 Id. 158; and there was such a privity between Wilcox and the parties defendant in these judgments as also to preclude him from impeaching them.

2. By entering into an unqualified agreement to become responsible for the result of the proposed litigation, Wilcox was bound by the judgment rendered therein whether he had notice or not; citing 12 Am. & Eng. Enc. Law, p. 97, § 13; *Collins v. Mitchell*, 5 Fla. 364; *Riddle v. Baker*, 13 Cal. 295; *Pico v. Webster*, 14 Id. 202; *Shepard v. Pebbles*, 38 Wis. 373; *Willey v. Paulk*, 6 Conn. 74; *Methodist Churches v. Barker*, 18 N. Y. 465.

3. The contract made by defendant's letter was neither that of guaranty nor suretyship, but an independent one on a sufficient consideration of its own; citing *Larson v. Jensen*, 53 Mich. 427; *Horn v. Bray*, 51 Ind. 555; *Crawford v. Turk*, 24 Gratt. 176.

4. The judgments were obtained in the customary manner, as appears from the transcripts introduced in evidence, and in the course of regular proceedings, and the court should not have allowed defendant to contradict them; citing *Williams v. Vail*, 9 Mich. 162; *Lothrop v. Southworth*, 5 Id. 496; *Hershler v. Reynolds*, 22 Iowa, 156; and the judgments, being valid in Indiana, must be given the same force and effect here as they had there; citing 12 Am. & Eng. Enc. Law, pp. 148*o*, 148*r*, and notes.

5. Whenever a person undertakes to do an act as agent of another, without authority, or if he exceeds his authority, he will be personally responsible in some form of action to the person with whom he is dealing; citing Thomp. Liab. Off. 78; Story, Agency, § 264; Wharton, Agency, § 524.

6. When a person assumes to act and contract as agent of a person or of a corporation, he must see to it that his principal is legally bound by his acts, for if he does not give a right of action against his principal the law holds him liable; citing *Randall v. Van Vechten*, 19 Johns. 60; *White v. Skinner*, 13 Id. 307; *Tippets v. Walker*, 4 Mass. 595; *Johnson v. Smith*, 21 Conn. 634; *Underhill v. Gibson*, 2 N. H. 352.

7. If Wilcox undertook to bind the bank by his letter, he did so without authority, and is personally liable upon the agreement contained therein, if there are apt words to bind him, striking out those which he had no authority to put therein; citing *Weare v. Gove*, 44 N. H. 196; *Weare v. School-dist.*, Id. 189; *Royce v. Allen*, 28 Vt. 234; *Brockway v. Allen*, 17 Wend. 40; Story, Agency, § 264*a*.

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8. Affixing the word "cashier" to his name, without stating that he signed the letter in such official capacity, will be held mere matter of description; citing *Bond v. Railroad Co.*, 62 Mich. 651; *Tilden v. Barnard*, 43 Id. 376; nor will the use of the word "we" instead of the pronoun "I" excuse him from liability; citing *Dederick v. Barber*, 44 Mich. 19.
9. The agreement of defendant was broad enough to cover attorney's fees paid in defense of an action on the bond; citing *Noll v. Smith*, 68 Ind. 188; *Wilson v. Root*, 43 Id. 486; *Raupman v. Evansville*, 44 Id. 392; *Ziegler v. Powell*, 54 Id. 178; *Finckh v. Evers*, 25 Ohio St. 82.

S. M. Constantine and *Dallas Boudeman*, for defendant, contended:

1. There can be no question but that Mr. Wilcox was acting or purporting to act for the corporation of which he was one of the officers. The parties Bellman & Handy were not customers of Mr. Wilcox individually, but of the bank. The use of the word "ours" unquestionably points to the bank, and the statement that "we will stand between you and all harm" is as strong as language can make it, that it was the corporation, and not Mr. Wilcox, who was making the agreement, whatever it was. This proposition cannot be answered by saying that Mr. Wilcox had no authority to bind the bank. There is no proof that he had none, and such a fact must be shown if relied upon. If the plaintiff seeks to recover on the ground that defendant exceeded his authority in that he attempted to act for the bank, and thereby in some way became himself responsible, he must show as a matter of fact that he did so exceed his authority, and not ask the court to presume it. The principle is that so long as he was cashier of the bank, and pretended to act for it, the contract is that of the bank, and not of Mr. Wilcox individually; citing *Carpenter v. Farnsworth*, 106 Mass. 561; *Means v. Swormstedt*, 32 Ind. 87; *Bank v. Hall*, 44 N. Y. 395; *Houghton v. Bank*, 26 Wis. 663; *Kennedy v. Bank*, 7 Neb. 59.
2. Nor can this question be disposed of by saying that national banks cannot enter into a contract of this character. The law creating them makes no such restriction or regulation. If, as a matter of law, the bank could not make such a contract, then the plaintiff is presumed to know what the law is in this regard, and, knowing the law, he must be presumed to know that an officer purporting to enter into a contract or obligation for a corporation when he cannot legally make such an agreement does not make himself liable personally; citing *Bank v.*

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Hanmer, 14 Mich. 208; *Garton v. Bank*, 34 Id. 279; *Bank v. Bank*, 1 Doug. 457.

3. There can be no question but that this contract is, in form, a contract of the bank. All its language shows this, and it is signed officially by the cashier of the bank. This action is brought against the defendant individually on the contract. If the defendant is liable at all for having exceeded his authority for acting when he had no authority, such liability is not upon the contract, but rests upon the ground that he warrants his authority. The suit as framed here, and set forth in the declaration, could not be sustained; citing *White v. Madison*, 26 N. Y. 117; *Baltzen v. Nicolay*, 53 Id. 469; *Bartlett v. Tucker*, 104 Mass. 336; *Bank v. Pepoon*, 11 Id. 292; *Jefts v. York*, 4 Cush. 371; *Abbey v. Chase*, 6 Id. 54; *Draper v. Heating Co.*, 5 Allen, 338; *Ogden v. Raymond*, 22 Conn. 379; *Taylor v. Shelton*, 30 Id. 122; *Lazarus v. Shearer*, 2 Ala. 718.

4. In a case like the present, the bare want of authority in the agent to bind the person or corporation for which he assumes to act does not render him individually liable where the facts and circumstances indicate that no such liability was intended by either of the parties. Where the facts are known to both parties, and the mistake is one of law as to the liability of the principal (as, for example, that the corporation could not be bound by the agreement), the fact that the principal cannot be held is no ground for charging the agent with the liability; citing *Michael v. Jones*, 84 Mo. 578; *Humphrey v. Jones*, 71 Id. 62; *Cement Co. v. Jones*, 8 Mo. App. 373.

5. Where the fact that the agent has no authority is known or could be known to either party, the agent could not be responsible for any contract so entered into. This would certainly be the case if the guaranty by the bank could not be legally made; citing *Hall v. Lauderdale*, 46 N. Y. 70; *Smout v. Ilbery*, 10 Mees. & W. 1; *Tiller v. Spradley*, 39 Ga. 35; *Newman v. Sylvester*, 42 Ind. 106; *McCubbin v. Graham*, 4 Kan. 397; *McCurdy v. Rogers*, 21 Wis. 197.

6. The authority of Wilcox to bind the bank is presumed. The law will not presume his want of authority, and, unless he is shown to have been acting for the bank without authority in fact, he could not be held in any form of action; citing *Walker v. Bank*, 9 N. Y. 587.

7. Where a party cashier of a bank does business purporting to be in favor of the bank, and his name is used, and the word "cashier" following it, the contract is a contract of the bank, and not that of the individual; citing *Babcock v. Beman*, 11 N. Y. 200; *Garton v. Bank*, 34 Mich. 280.

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CAHILL, J. This was an action of *assumpsit* brought to recover upon a written undertaking to indemnify the plaintiff against all harm by reason of his signing a replevin bond with Bellman & Handy in a suit brought by them against Naomi Warner, at Elkhart, Ind. The following is the undertaking sued on:

"JOHN COX, HENRY HALL, L. T. WILCOX, E. E. WILCOX,
President. Vice President. Cashier. Asst. Cashier.
"Established 1872. Reorganized 1884.
"THREE RIVERS NATIONAL BANK.
"THREE RIVERS, MICH., OCT. 11, 1886.
"W. H. KNICKERBOCKER, Cashier,
"Elkhart, Indiana.
"*Dear Sir:* A replevin suit has been commenced in your county by Bellman & Handy, of this place, against Naomi Warner, of your place. They (B. & H.), being non-residents, are required to give bonds. They are good customers of ours, and if you will sign said bond we will stand between you and all harm.
"L. T. WILCOX, Cashier."

Defendant pleaded the general issue, and gave notice that it would be shown on the trial that the defendant did not, in any way, individually enter into the contract alleged in plaintiff's declaration; and also that if he ever did, either individually, personally, or as the agent or in behalf of another, enter into such contract, the conditions of the same had been fully satisfied and performed.

It is claimed by the plaintiff that, on the strength of defendant's letter, he signed the replevin bond as requested, as surety for Bellman & Handy, and that the same was delivered to the sheriff, who thereupon delivered the property taken under the writ to Bellman & Handy; that the replevin suit came on for trial in the Elkhart circuit court, and Bellman & Handy were defeated. The defendant elected to take a judgment for a return of the property. To satisfy such judgment the same was returned to her. Nevertheless, she insisted

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that certain goods were not returned, and that other goods were returned in a damaged condition, and she brought suit upon the replevin bond in the Elkhart circuit court against Bellman & Handy, as principals, and Knickerbocker, as surety, to recover such damages. Bellman & Handy and Knickerbocker each employed Mr. VanFleet as attorney to defend that action. There is no legal evidence in the record that Mr. Wilcox had notice of this suit, or opportunity to defend it. Upon the trial of this suit on the replevin bond, Mrs. Warner, the plaintiff, recovered a verdict for $107.50, and costs. The court, on motion of defendants, granted a new trial, and, when the same was about to come on for a second trial, Mr. VanFleet, being of the opinion that it would be cheaper and better for his clients to compromise the suit than to try it, took the responsibility to effect a settlement, and for that purpose consented that Mrs. Warner might take a judgment against his clients for $50, and costs of the first trial. At this time, neither Bellman, Handy, nor Knickerbocker was present in court, or had any knowledge of such proposed settlement. But Bellman & Handy were at once notified of the same, and, upon their objecting to such judgment, were informed by their attorney, Mr. VanFleet, that Mrs. Warner was also dissatisfied, and that her attorney would consent to set aside the judgment and have a new trial, and that they could employ other counsel if they wished. This offer was not accepted, and the judgment of $50, and costs, was allowed to stand, and the plaintiff, Knickerbocker, paid the same, on January 18, 1888, amounting in all to $183.75.

Afterwards, Mr. VanFleet presented a bill to Bellman & Handy for his services in the defense of the suit on the replevin bond. They refused to pay it, and he commenced suit in the Elkhart circuit court against Mr.

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Knickerbocker for the same bill. Thereupon Mr. Knickerbocker notified Mr. Wilcox personally of the fact that he had been sued, and that it was necessary for him to appear and defend. To this notice Mr. Wilcox paid no attention. In that suit a judgment was recovered by Mr. VanFleet against Mr Knickerbocker for $150 damages, and $10.50 costs, which Mr. Knickerbocker afterwards paid. After the payment of these two judgments, Mr. Knickerbocker called upon Mr. Wilcox to make good his agreement and save him harmless by reason thereof. This Mr. Wilcox refused to do, and this action was brought.

Upon the trial the plaintiff offered in evidence the letter written by Mr. Wilcox to him, October 11, 1886, upon the strength of which he claimed to have signed the replevin bond. This was objected to by defendant, upon the ground that it was not the undertaking of the defendant, but it appeared upon its face to be the undertaking of the Three Rivers National Bank, of which Mr. Wilcox was cashier. The objection was overruled, and the letter admitted.

Plaintiff also offered in evidence transcripts of the two judgments rendered against him in the Elkhart circuit court, and which he claimed he had been compelled to pay. These were objected to by the defendant upon the ground that it did not appear from any evidence in the case that the plaintiff had signed any replevin bond, as requested by defendant, and that it was incumbent upon the plaintiff to show the original of such bond, and that the plaintiff had, in fact, executed the same. The original of the replevin bond was not produced nor offered in evidence upon the trial. But what purported to be a copy of such bond, found in the transcript of the suit brought on the replevin bond, was offered, together with evidence by Mr. Knickerbocker and Mr. VanFleet that

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the same was a true copy of the original bond. It was not shown that the original bond was lost, nor was the failure to produce it accounted for, otherwise than by evidence that it was delivered originally to the sheriff in Indiana, and sued on by Mrs. Warner in that state.

The defendant was allowed, on cross-examination of plaintiff's witnesses, to interrogate them in relation to facts having a tendency to impeach the judgments upon the ground that they were collusive and fraudulent as to Wilcox. This was objected to by plaintiff's counsel, and error is assigned upon this ruling.

When the plaintiff had rested his case, the court, on motion of the defendant's counsel, instructed the jury to render a verdict for defendant. Error is assigned upon this ruling.

It does not appear upon what ground this instruction was given. It is defended by counsel for defendant upon the ground, first, that the alleged guaranty was not and did not purport to be the individual guaranty of the defendant, Wilcox; that he was acting for the Three Rivers National Bank, in his official capacity, as cashier. Undoubtedly, if the paper in question had been a note or bill of exchange, or any other instrument which it was clearly within the power of the cashier to make for the bank, no question could be raised as to its being the contract of the bank. But in this case the paper relied on shows on its face that it was given in the course of a transaction which the bank could not lawfully enter into. National banks possess only such powers as are expressly conferred upon them by the act of Congress under which they are organized, and no power is given them to enter into contracts of suretyship in which they have no interest. Rev. Stat. U. S. § 5136; *Bullard v. Bank,* 18 Wall. 589; *Matthews v. Skinker,* 62 Mo. 329; *Wiley v.*

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Bank, 47 Vt. 546; *Bank v. Hoch*, 89 Penn. St. 324. This rule of law must be presumed equally well known to both parties.

The paper not being the contract of the bank, then, can it be said to be the contract of Wilcox himself? Does it, upon its face, appear so clearly to have been *intended* as the undertaking of the bank, executed through Wilcox as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties? In deciding this question, weight must be given to the argument that the writing of this letter will not lightly be assumed to have been a mere idle ceremony. We must assume that the parties to it intended it to have some effect. The cases in Missouri (*Michael v. Jones*, 84 Mo. 578; *Humphrey v. Jones*, 71 Id. 62; and *Cement Co. v. Jones*, 8 Mo. App. 373), relied on by counsel for defendant, were all cases in which the guardian of an insane person had traded with his ward's estate, contrary to the provisions of law, and had suffered losses. The persons dealing with him had done so with full knowledge of the fact that he was acting not for himself, but for his ward. It was held that where the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent.

We cannot apply that rule to this case, for the reason that it does not clearly and unequivocally appear that Wilcox was claiming to act for the bank, and that he was not intending to bind himself. To say that he intended to bind the bank is to suppose him ignorant of the plain rules of law governing the institution of which

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he was a principal officer. There are many cases in which it has been held that the addition to one's signature of his title does not make the paper the contract of the corporation in which he is an officer. Such designation has been treated as a mere description of the person. *Tilden v. Barnard,* 43 Mich. 376; *Hayes v. Brubaker,* 65 Ind. 27.

The second argument advanced in support of the judgment is that there was no proof in the case that the plaintiff signed the replevin bond as he alleged in his declaration. I think this point is without force. The judgment record in the suit brought upon the replevin bond shows a copy of the bond set out at length in the complaint, as the only cause of action relied on. It will be presumed in support of such judgment that it was rendered after due proof of the execution of the bond declared on. For the purpose of identifying the judgment, as rendered upon the bond signed by plaintiff at defendant's request, parol testimony was admissible. I think, also, a foundation was laid for the admission of secondary evidence of the execution of the bond. It was never in the possession of the plaintiff. It was delivered in the first instance to the sheriff at Elkhart, Ind., and by him assigned to Mrs. Warner, who brought suit on it in that state. Presumably, therefore, it was out of the jurisdiction of the courts of this State, and secondary evidence of its contents was admissible. *Woods v. Burke,* 67 Mich. 674.

The third reason urged by defendant in support of the judgment is that the judgments rendered in Indiana, for the payment of which plaintiff seeks to recover, were collusive and fraudulent as to him, and that he was not bound by them. If he is right in this position, still the questions involved in such a claim are not such as should

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have been passed upon by the court, as was done in this case. The question of fraud and collusion was for the jury, and should have been submitted to them, if properly in the case, under proper instructions.

As the case must go back for a new trial, I think it proper to say that the Indiana judgments, while *prima facie* evidence of the amount which the defendant is liable to pay to indemnify the plaintiff, are not conclusive upon him. He had no notice of the pendency of the first suit, and the judgment in that suit was finally entered by consent. It is open to him to impeach the good faith of this transaction if he can do so. If Mr. Knickerbocker employed counsel in good faith to defend that action, it was proper for him to do so, and any expense incurred by him in such defense was incurred for the benefit of Wilcox, as well as himself, and Wilcox would be liable to indemnify him against such payment. Of the suit brought by Mr. VanFleet against Mr. Knickerbocker for counsel fees, Mr. Wilcox had due notice, and was asked to defend. Having declined to do so, we think he is bound by the judgment, unless it appear that it was rendered under such circumstances of collusion between the parties as would amount to a fraud upon Wilcox.

The circuit judge was wrong in directing a verdict for the defendant, and the judgment must be reversed, and a new trial granted.

The other Justices concurred.

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ISAAC McKISSON AND MARY WAGGONER v. IRA DAVENPORT ET AL.

Mortgage—Foreclosure—Statute of limitations—Equity.

1. Act No. 204, Laws of 1879 (How. Stat. § 8709), in so far as it bars mortgage foreclosures, at law or in equity, unless commenced within fifteen years from and after the maturity of the mortgage debt, or within a like period after the last payment was made thereon, is not *retroactive*.

2. The proviso to Act No. 204, Laws of 1879 (How. Stat. § 8709), which excepts from its operation mortgages which have been due, or the last payment upon which was made, fifteen years or more prior to the passage of the act, and bars suits or proceedings for their foreclosure unless commenced within five years after the act took effect, provides for a reasonable time within which to commence such suits or proceedings.[1]

3. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—This Court has repeatedly recognized the doctrine that while the statute of limitations is to be favorably regarded by the courts, as being one of repose as well as of presumption of payment, affording security against stale claims, yet injustice must not be done nor the statute defeated by an undue strictness of construction, but the legislative intent must be carried into effect; citing *Ten Eyck v. Wing*, 1 Mich. 40; *Jewett v. Petit*, 4 Id. 508; *Jenny v. Perkins*, 17 Id. 28; *Gorman v. Circuit Judge*, 27 Id. 138; *Palmer v. Palmer*, 36 Id. 487; *Toll v. Wright*, 37 Id. 93; *Proctor v. Bigelow*, 38 Id. 282; and it has been also held that such statutes must be construed to operate *prospectively* only, unless their terms clearly indicate a different intent; citing *Harrison v. Metz*, 17 Mich. 377; *Ludwig v. Stewart*, 32 Id. 27; *Price v. Hopkin*, 13 Id. 318; *Stambaugh v. Snoblin*, 32 Id. 296; *Smith v. Auditor General*, 20 Id. 398.

b—Every suitor must have a reasonable time in which to commence an action to enforce his rights, and it is for the Legislature to provide a general rule applicable to all cases falling within a class, and not for the judiciary to declare what is or should be a reasonable time varying with the circum-

[1] See *Kingman v. Sinclair*, 80 Mich. 427.

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stances of each case as it arises; citing *Ludwig v. Stewart*, 32 Mich. 27; *Parsons v. Circuit Judge*, 37 Id. 290.

Appeal from Eaton. (Hooker, J.) Argued October 30, 1890. Decided November 14, 1890.

Bill to remove a cloud caused by mortgages claimed to be outlawed under Act No. 204, Laws of 1879, and to set aside statutory foreclosures of the same. Answer claims the benefit of a cross-bill, and prays that the foreclosure proceedings be declared valid. Decree dismissing bill, and granting affirmative relief prayed for in answer, affirmed. The facts are stated in the opinion.

H. A. Shaw, for complainants.

Boudeman & Adams, for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

CHAMPLIN, C. J. This is a bill in equity, but there is no equity in the bill.

Complainants allege that they are joint owners of the N. W. ¼ of section 25 in township 2 N., range 3 W; that, on September 1, 1862, Ira Davenport conveyed the E. ½ of the above-described land to John W. Reed, and took back a purchase-money mortgage for $440 secured upon the land sold; and that on the same day the complainant Isaac McKisson purchased from said Ira Davenport the W. ½ of the N. W. ¼, and, to secure a part of the purchase money, gave to said Ira Davenport a mortgage upon the land purchased by him for $440,—both mortgages being payable three years from the date thereof; that on October 6, 1864, John W. Reed conveyed to Edgar J. Reed; and on February 28, 1866, McKisson purchased the E. ½ of the N. W. ¼ from Edgar J. Reed, taking a deed subject to the mortgage to Davenport.

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The bill then sets up several conveyances by the way of deed and mortgage, those made by complainant McKisson conveying subject to the two mortgages to Davenport, until, in 1873, McKisson again became the owner of the quarter section. The bill shows that all of his title and right to the land was derived from Ira Davenport, and is based upon the two conveyances first above mentioned. Complainants state that Davenport's title was based upon several tax titles from the State of Michigan, but nowhere state that McKisson acquired the title from the owner of the original title, while the answer and the proofs show that Davenport was at the time of the conveyances to McKisson and to Reed the owner of the original title, and the proofs further show that McKisson knew that fact long before the bill in this case was filed; and yet complainants charge that there was a question about the title conveyed by Davenport because of the original title outstanding.

Complainants further state that one John M. Corbin acquired three tax titles on the land, for the years 1876, 1877, 1878, and McKisson induced his wife (now deceased), the mother of complainant Mary Waggoner, to buy such tax titles, and Corbin executed a quitclaim deed to her for $500, dated April 12, 1880; and that he, to secure his wife the payment of $1,800, executed to her a trust-deed upon the undivided half of the 160 acres. This deed was made expressly subject to the Davenport mortgages, and to her tax deed. The purchase of these tax titles did not create an adverse title in McKisson or his wife. It was merely the payment of taxes which he, as holder of or interested in the legal title procured from Davenport, was in duty bound to pay. But if otherwise, the tax titles so purchased by Corbin were by the proofs introduced in the case shown to be void.

The bill charges that these mortgages belonging to the

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estate of Ira Davenport are a cloud upon complainants' title, because no interest has been paid upon either of them since September 1, 1867, and that they should be presumed to have been paid, and be canceled and discharged of record. And complainants rely upon the statute passed by the Legislature of this State in 1879, which reads as follows:

"No suit or proceeding shall be maintained to foreclose a mortgage on real estate, either at law or in equity, unless commenced within fifteen years from and after such mortgage shall become due and payable, or within fifteen years after the last payment was made on said mortgage: *Provided, however,* That this act shall not be construed to apply to mortgages which have been due fifteen years or more, or the last payment upon which was made fifteen years or more, prior to the passage of this act, but, in all such cases, no suit or proceedings shall be maintained to foreclose the same unless commenced within five years after this act shall take effect." How. Stat. § 8709.

The proceedings to foreclose the mortgages in question were commenced on May 16, 1887, and this bill was filed in February following. The mortgages became due and payable September 1, 1866, and the last payments were made September 1, 1867. It will therefore be seen that the proviso in the statute does not apply to these mortgages. If the time when the statute should begin to run be fixed at the date when the mortgages were payable, then the time would expire and be barred September 1, 1881; and if the time runs from date of last payment, the action, under the statute, would expire September 1, 1882. The complainants insist that this act is a bar to foreclosure, and defendants contend that the statute ought not to be construed as retroactive, except as to the cases mentioned in the proviso, which expressly applies to mortgages which have been past due more than 15 years, and no payments made upon them within 15 years; that, as to mortgages given within that time,

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and before the passage of the act, they are left to be controlled under the law and decisions which existed at the date of the passage of the act.

This Court has repeatedly recognized the doctrine that while the statute of limitations is to be favorably regarded by the courts, as being one of repose as well as of presumption of payment, affording security against stale claims, yet injustice must not be done by an undue strictness of construction, nor the statute be defeated by such construction, but the legislative intent must be carried into effect. *Ten Eyck v. Wing*, 1 Mich. 40; *Jewett v. Petit*, 4 Id. 508; *Jenny v. Perkins*, 17 Id. 28; *Gorman v. Judge*, 27 Id. 138; *Palmer v. Palmer*, 36 Id. 487; *Toll v. Wright*, 37 Id. 93; *Proctor v. Bigelow*, 38 Id. 282. We have also held that statutes of limitation must be construed to operate prospectively only, unless their terms clearly indicate a different intent. *Harrison v. Metz*, 17 Mich. 377; *Ludwig v. Stewart*, 32 Id. 27; *Price v. Hopkin*, 13 Id. 318; *Stambaugh v. Snoblin*, 32 Id. 296; *Smith v. Auditor General*, 20 Id. 398.

Every suitor must have a reasonable time in which to commence an action to enforce his rights, and it is for the Legislature to provide a general rule applicable to all cases falling within a class, and not for the judiciary to declare what is or should be a reasonable time varying with the circumstances of each case as it arises. Important legal and property rights depend upon the rule within which such right must be asserted, or, failing to do it, will be lost; and the necessity of a fixed, certain, and definite rule established by legislative authority is manifest. *Ludwig v. Stewart*, 32 Mich. 27; *Parsons v. Judge*, 37 Id. 290. The proviso of the act does provide for a reasonable time in all cases where the debt has been due and no interest paid thereon for 15 years prior to the act taking effect. But it has entirely failed to fix any

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period as a reasonable time in cases where the mortgage debt has matured within the period of 15 years previous to the act taking effect. The law took effect August 29, 1879. A mortgage maturing August 28, 1864, upon which no payment of interest had been made thereafter, would not be barred until August 28, 1884. A mortgage maturing August 31, 1864, would be barred August 31, 1879, or one day after the act took effect. No one would say that this is a reasonable time, and yet such would be the result in such a case, if the act is to be given a retroactive effect.

In the case of these two mortgages, which complainants pray to have canceled and discharged, 12 years had already elapsed since the payment of interest when the act took effect. Did the Legislature intend that actions to foreclose those mortgages should be barred in three years, when, if no payment of interest had been made, and they had matured three years or six years earlier, they would not have been barred in five years from the time when the act took effect? The Legislature could not have intended the older and more stale the instrument the more favorable would the law be in affording a remedy. And can it be doubted, since the Legislature fixed a reasonable time to enforce such stale mortgages, they would, if they intended the act to apply to existing mortgages which had not matured at the passage of the act, or had matured within the 15 years prior thereto, have fixed a reasonable time after the passage of the act, if they matured within five years from its taking effect, in which to foreclose? Would not the Legislature have said that all mortgages maturing within 15 years, and more than 10 years, before the time the act took effect, might be enforced by foreclosure within 5 years after the act took effect, and if not so enforced would be barred, and no action be maintained to foreclose them, thus making the

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rule uniform? Or at least they would have provided a definite rule. The statute construed in *Harrison v. Metz*, 17 Mich. 377, was as positive in its language as the enacting clause of the one under consideration, and this Court held it to be prospective only. After that decision was rendered, the Legislature amended the statute so as to make it apply to judgments theretofore rendered, and this amendment was construed in *Parsons v. Judge*, 37 Mich. 287, 289. The enacting clause of this statute must be held to speak from the time the act took effect, and to apply only to mortgages executed in the future. The mortgages mentioned in complainants' bill, owned by the executors of Ira Davenport, were subject to the rules governing such instruments at the time the act of 1879 was passed.

The mortgage debt, and the lien of the mortgages upon the land, as security therefor, have always, to about the time foreclosure proceedings were commenced, been recognized and acknowledged by complainant McKisson. These acknowledgments have been in writing, and at two different times after he and the parties owning the mortgages had, as a matter of compromise, agreed upon the amount which they would accept and receive from him in full discharge of the debt and mortgages, he agreed to pay them the amount so agreed upon at a designated time in the future. This was as late as 1883 and 1884. But he has neglected and failed to make such payment. These promises were in writing, and the debt and liens were continued thereby upon a sufficient consideration, and the plea of the statute of limitations cannot avail the complainants as a defense to such mortgages.

Complainants do not come into court with clean hands. After years of delay, at the special instance and request of McKisson, after repeated promises to pay the debt secured by the mortgages, after negotiations in which he

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promised, if defendants would take less than the amount due them by more than $200, and after promising to pay such amount agreed upon within 90 days, and neglecting to fulfill such promise, he is not entitled to be relieved from all liability, and the land discharged of all liens for the debt, through the interposition and assistance of a court of equity, which is guided by the maxim that "he who asks equity must do equity."

We are satisfied that the decree appealed from is correct, and it is affirmed, with costs of both courts. The record will be remanded to the court below for execution of the decree.

The other Justices concurred.

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JUDSON J. DIKEMAN AND ORVILLE DOUGHERTY v. OTIS ARNOLD.

[See 71 Mich. 656; 78 Id. 455.]

Res judicata—Practice in circuit court—Argument of counsel—Assignments of error.

1. The law of this case was settled by the opinions in 71 Mich. 656, and 78 Id. 455, and ought to, and must, under all of the authorities, remain the law so far as this case is concerned.
2. An attorney is entitled to some license in his argument, and the testimony to him may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge.
3. Where the record, and the brief of the appellant, are printed and served at the same time, inclosing the clauses of the charge which are objected to in brackets in the record is a convenient method of calling attention to them, and is permissible.

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Error to St. Joseph. (Loveridge, J.) Argued October 30, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion, and in the former reports of the case.

O. F. Bean, Howard & Roos, and *Osborn & Mills,* for appellant.

Howell, Carr & Barnard and *Boudeman & Adams,* for plaintiffs.

MORSE, J. It will be unnecessary to state the facts in this case. It has been here twice before, and will be found reported in 71 Mich. 656, and 78 Id. 455.

The plaintiffs have recovered judgment three times in the court below, upon substantially the same state of facts. In the opinions of this Court when the case was here before, the law applicable to the pleadings and the facts involved was pointed out in detail, and the trial court seems to have followed these opinions fully and fairly. We are not disposed to question or discuss the wisdom or legality of our former holdings or rulings upon any point in the case. The law was settled by our former decisions, and ought to, and must, under all the authorities, remain the law as far as this case is concerned. The circuit judge could not do otherwise than follow our instructions. And we may with propriety further say that as yet we have seen no reason for departing from our previous rulings, and that our views as to the law of the case have undergone no change.

The testimony admitted as to negotiations between the parties was proper to give a history of the transaction, and was used for no other purpose. The testimony which we held in 78 Mich. 458, 459, to have been improperly

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admitted and improperly used upon that trial was not offered or admitted on this one. It was proper to show what took place on the night of the 15th of June, and on the 16th, and what Arnold did and said thereafter in regard to the trade.

What defendant said to the witness Shellenberger on the morning of the 16th, before it is claimed the deed was made, would not have been proper standing alone, as it would have been irrelevant to any issue in the case; but, coupled with the testimony of what he said to the same witness on the 17th, the day after it is claimed the deed was delivered, and the trade of the two farms consummated, it became not only relevant, but important. Shellenberger testified that on the morning of June 16 he talked with Arnold about buying a lot, and Arnold said he was about making a trade of the land to Dikeman, and that the witness should see him again. Witness saw him again the next morning, and Arnold told him he had traded with Dikeman, and he must go to him to get the lot. If this testimony was believed, it tended strongly and legitimately to show that the deed was delivered and accepted on the 16th, as claimed by plaintiffs.

The evidence of the witness Neidhardt, who was sworn in rebuttal, that Arnold came into his store on the 16th, and said that he had traded for the Shaw farm, and the papers were being made out, did not have much relevancy upon the question whether or not the deed was delivered that day, but it was a part of the transactions of that day, and, while he was talking, Dikeman came in, and said, "Mr. Arnold, we are ready for you now," and they went out of the store together. We do not think the defendant was harmed by this testimony. And, in one aspect of the case, it was admissible in rebuttal of the claim made by Arnold in his evidence that he

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never intended to trade on that day, nor on any other day, until Bean had looked over the abstract.

On cross-examination by defendant's counsel of Mrs. Dikeman, a witness for the plaintiffs, she was asked if, after the deed and other papers had been signed, she did not say, "I wonder who will guaranty Mrs. Arnold's signature?" She was then further asked why she made this remark, and answered,—

"Because, when my uncle, Andrew Leland, deeded their farm, Mrs. Arnold wouldn't sign until he paid $50.
"*Q.* How do you know about that?
"*A.* My uncle told me."

A motion was made to strike out this testimony, which motion was denied. This is assigned as error. No error was committed in allowing the answers to stand. When the witness was asked why she made this remark, she had a right to give her reason for making it, and the cross-examiner must take her answer as she gave it.

We find no error in the admission of the testimony of Mrs. Stebbins. The fact that Mr. Bean drafted the deed in which a mistake was made, and all the land not conveyed, may not have been important; but it was proper to show that Mrs. Stebbins intended to convey by this deed her whole title to the premises, and had since acted on the assumption that she had no further interest in it, and that Arnold so understood it. We do not think that permitting her to state that Mr. Bean drew the deed influenced the jury at all in arriving at their verdict. There could have been no error in showing who drafted the deed had it not been for the claim of counsel in offering the proof. As it was, the error of counsel's statement was not, in our view of the case, a prejudicial one.

Various exceptions were taken to the remarks of Mr. Boudeman, one of the attorneys for the plaintiffs, in summing up the case to the jury. While some of his deduc-

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tions from the testimony, and claims made by him, might not coincide with our ideas, we find no such error in any of his remarks as would warrant a reversal of the judgment. An attorney is entitled to some license in his argument, and the testimony to him may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge. But if we were to reverse cases because the attorneys of the parties claimed more from the testimony for their clients than we could discern in the evidence, or argued that facts were established when we thought they were not, we should not only invade the province of the jury, but vacate most, if not all, of the judgments that come for review before us.

In the history of the transaction that took place on June 16, it was attempted to show by Arnold and others what took place in Bean's office when Arnold took the abstract to him. The refusal to receive this testimony is assigned as error. While it was proper to show that Arnold took the abstract over to Bean's office, it was not competent to show what took place there in the absence of the plaintiffs. *Riley v. Conner*, 79 Mich. 497.

Various objections are made to specific portions of the charge of the circuit judge to the jury. The clauses thus objected to are inclosed in brackets in the printed record, which is a convenient method of calling our attention to them, and permissible. We say this because some objection was made upon the argument here to this method of pointing out the errors claimed in the charge, because the assignments of error referred to these brackets by numbers, as they were numbered in the printed record. If the record is printed and served at the same time as the appellant's brief, the method is a good one, as it saves printing the portions objected to in full, and also much hunting in the record to find such portions.

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A careful examination of the portions of the charge excepted to, as well as of the whole charge, satisfies us that no error was committed in the instructions of the court to the jury. The law of the case as heretofore settled by this Court was fairly and clearly stated to the jury.

The judgment must be affirmed, with costs.

The other Justices concurred.

ANDREW BITZER v. GEORGE A. WAGAR.

Bills and notes—Negotiability.

A promissory note payable to the "order of Marget A. Bitzer (or bearer)" is payable to bearer, and suit can be maintained thereon in the name of any holder.

Error to Oceana. (Dickerman, J.) Submitted on briefs October 28, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

W. E. Ambler, for appellant.

Fred J. Russell, for plaintiff.

LONG, J. This action was brought in the circuit court for Oceana county, upon a promissory note reading as follows:

"$100.00. HART, MICH., March 20, 1889.

"Eight months after date I promise to pay to the order of Marget A. Bitzer (or bearer) one hundred dol-

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lars, at the Oceana County Savings Bank, value received, with interest at the rate of 6 per cent.

"BERT SPELLMAN.
"G. A. WAGAR."

On the trial the plaintiff had judgment. Defendant brings error. But two questions are raised:

1. That the court erred in not allowing defendant a trial of said cause on the merits, it appearing that an affidavit of merits had been filed and served on the morning of the first day of term.
2. That the court erred in admitting in evidence the note in question, for the reasons—
a—That the note is payable to the order of Marget A. Bitzer, and has never been indorsed or transferred by her to plaintiff, and the title and ownership is still in Marget A. Bitzer, and not in plaintiff.
b—That said note is not competent evidence, for the reason that plaintiff has not shown that he owns or has property in said note.

The record itself is a plain contradiction to the statement of defendant's first proposition. The cause came on for hearing before the court without a jury. The parties and their attorneys were present in court ready for trial. The attorney for the plaintiff requested an inquest taken on the note, the cause having been noticed for inquest under Circuit Court Rule No. 99, and no affidavit of merits having been filed or served on the plaintiff's attorney prior to the first day of term. Defendant made a showing to the court that he had served an affidavit of merits on the plaintiff's attorney the morning of the first day of term, and requested an order allowing a trial on the merits. The record then states the further proceedings thereon, as follows:

"The court thereupon declined to make any order in said cause at that time, but reserved decision until said cause should be finally tried. And thereupon, upon the 22d day of April, at the opening of the court, the

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attorney for the plaintiff asked the court to take said cause up and try the same, and the defendant's attorney then requested the court to give the defendant the right to defend said cause on the merits, and requested the court not to take the cause up until two o'clock in the afternoon of said day, and stated that he would be ready for trial at that time. Thereupon the said court informed the attorneys for the respective parties that he would not allow the plaintiff to proceed with said cause at that time, but that he would set said cause for trial at two o'clock P. M. of that day, said cause then being on call, at which time he would try said cause. The attorneys for the respective parties in open court stated that they expected to have their witnesses in attendance at that time."

It is further made to appear that at that hour the parties appeared, and the trial proceeded. The plaintiff introduced the note in evidence, swore a witness as to the computation of interest thereon, and rested his case. The record then states:

"The defendant's attorney offered no evidence, stating that he had expected some witnesses, but that they had not arrived, and that he had nothing further to offer."

No other interpretation can be given this language found in the record than that the court granted the motion of defendant's counsel, and permitted him if he had any defense to the note upon the merits to offer it on the trial, and that he declined to make any. He did not ask a continuance of the cause, but announced himself ready for trial, and, after the plaintiff rested, stated that he had nothing further to offer. This objection, stated upon such a record as now produced, shows great carelessness upon the part of counsel bringing the case into this Court, or an utter disregard of the facts contained in the record.

The other objection is equally frivolous. The note is

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plainly payable to bearer, and suit could be maintained thereon in the name of any holder.

The judgment must be affirmed, with costs.

The other Justices concurred.

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OTTO D. BJORKQUEST v. GEORGE A. WAGAR.

Action—Name of plaintiff—Open account—Amount due.

1. A plaintiff who is the *sole* proprietor of a business which he carries on under a *firm* name has the right to sue a debtor in his *individual* name, and in fact can sue in no other way.
2. Where, after proving the amount due on an open account by the admissions of the debtor, an affidavit of the amount due, made and served pursuant to How. Stat. § 7525, was received in evidence against the objection of the defendant, the reception of such evidence, even if inadmissible, is non-prejudicial error.

Error to Oceana. (Dickerman, J.) Submitted on briefs October 28, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

W. E. Ambler, for appellant.

T. S. Gurney, for plaintiff.

LONG, J. This action was commenced by declaration, and copies of an affidavit of the amount claimed to be due on an open account, and of the account, were served under the statute, as follows:

"STATE OF WISCONSIN, } ss.
"County of Milwaukee, }

"Otto D. Bjorkquest, sole member of the firm of O. D. Bjorkquest

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& Son, being duly sworn, deposes and says that he is the plaintiff named in the annexed account; that at the time the contract in question was made said plaintiff was and still is doing business under the firm name of O. D. Bjorkquest & Son; that the foregoing and annexed account is correctly made out from the books of original entry of said O. D. Bjorkquest & Son; that the said charges were made in said books at or about the time of their respective dates; that goods for which said charges were made were sold and delivered by said O. D. Bjorkquest & Son to George A. Wagar; that the charges are correct, and the account just and true, as stated, to the best of deponent's knowledge and belief.

"That the demand of said O. D. Bjorkquest & Son against said George A. Wagar, as shown by the annexed account, is just, due, and unpaid; that there is no just offset known to deponent, either in law or equity, against said demand; that all just and legal set-offs, payments, and credits have been given to said account; that there is now due to the said O. D. Bjorkquest & Son from said George A. Wagar, upon said open account, the sum of three hundred sixty-two and 19-100 dollars, as near as this deponent can estimate the same, over and above all legal set-offs; and that interest is due thereon from the first day of April, A. D. 1889, at the rate of six per cent. per annum.

"OTTO D. BJORKQUEST.

"Subscribed and sworn to before me this 25th day of November, A. D. 1889. C. H. WILLIAMS,

"Notary Public, Milwaukee Co., Wis."

COPY OF ACCOUNT.

"MILWAUKEE, Sept. 17, 1889.

"*George A. Wagar, Mears, Michigan.*

"In account with O. D. BJORKQUEST & SON, 300 & 302 Broadway.

1888.	June	19.	To Mdse. 4 in	$ 51 35
	Oct.	23.	" " "	214 70
	Dec.	17.	" " "	86 60
1889.	Feb.	14.	" " "	59 54
				$412 19

CREDIT.

1888.	Oct.	23.	By Cash	50 00
				$362 19
			Interest, 7 per cent	11 08
				$373 27"

Notice was given under the money counts that plaint-

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iff would give in evidence the affidavit and account attached, and that the same constituted the plaintiff's sole cause of action. Defendant pleaded the general issue, and gave notice of set-off, but furnished no bill of particulars of the same.

The cause came on for trial in the circuit court for Oceana county, and the plaintiff called as a witness Mr. T. S. Gurney, who testified that on September 23, 1889, he called upon defendant, Wagar, and showed him the account which was attached to the declaration; that he took the account and examined it, and said it was all right, that the amount was all right, and that he owed them that much, and as soon as the weather would permit he would run out a barge of lumber, and pay it. The account was for $373.27, and interest from April 1, 1889. The plaintiff also put in evidence, without objection, two letters written by the defendant to Mr. Gurney, one dated November 30, 1889, and the other December 3, 1889; the first asking one week's time, and the other for 30 days more in which to pay, at the end of which time he would pay sure. Plaintiff then offered in evidence the affidavit of plaintiff attached to the account, and the return showing the service of the same upon the defendant. Objection was made to this upon the following grounds:

1. That the jurat to the affidavit shows that the date has been changed.
2. That the plaintiff cannot prove by affidavit attached to the declaration that he is the sole party in interest of the firm with whom defendant dealt.

The account, affidavit, declaration, and officer's return showing service of the declaration, with affidavit and account attached, were then offered and received in evidence under objection of defendant's counsel. The plaintiff then rested his case. Defendant offered no evidence.

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The cause was tried before the court without a jury, who entered judgment for amount of plaintiff's claim. Defendant brings error.

The errors assigned are substantially the same as the objections made upon the trial, with the additional statement of defendant's counsel that it is not competent, by the affidavit attached to the declaration, to show that plaintiff is doing business under a fictitious name, or has adopted some manner of designating his business dealings other than his own name; and, further, that there is no evidence in the cause showing that the plaintiff is the person, assignee, or successor of the firm with whom defendant dealt. These defenses are purely technical, and none of them have any merit. The account is not disputed, or any item of it denied. The defendant, when presented with it, admitted its correctness, and thereafter asked further time to pay it, and therefore, unless these objections, or some one of them, amount to a legal defense, and are insurmountable in the way of the plaintiff's recovery, the judgment must be affirmed.

The first objection, that there appears to have been a change made in the jurat to the affidavit, has no force. It appears from Mr. Gurney's testimony that these changes were made before the commencement of suit, and when the affidavit came from the hands of the plaintiff at Milwaukee to Mr. Gurney in this State.

How. Stat. § 7525, provides for the service of declaration with statement of account and an affidavit showing its correctness, and makes the account, when so served, *prima facie* evidence of its correctness, unless the defendant with his plea shall make and file an affidavit denying its correctness. No such affidavit was filed, and on the trial the declaration, with return of the officer indorsed there-

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on, showing that the affidavit and account were duly served on the defendant, were competent evidence for the plaintiff in establishing his *prima facie* case. But, even if this were not the intent of this statute, the defendant is in no wise damnified by the admission in evidence of these papers. The proof of the account is made by the admissions of the defendant himself to Mr. Gurney.

There is but one other question. It seems that the plaintiff was doing business on his sole account, under the name of O. D. Bjorkquest & Son. This was stated in the affidavit attached to the account in the declaration, and the account was sued in the name of Otto D. Bjorkquest, and so stated in the declaration. There was no attempt on the part of the plainfiff to prove a partnership by the affidavit attached to the declaration, as is now claimed by the defendant's counsel, but rather a claim was made that the plaintiff was the sole proprietor of the business of O. D. Bjorkquest & Son, and was doing business under that name, at the time the account was made with the defendant. Under such circumstances, the plaintiff had the right to sue in his individual name, and in fact he could sue in no other way.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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MILO A. JENNINGS v. MARY L. MOORE AND ABRAM SMITH.

Mortgage—Assignment of part interest—Foreclosure—Redemption—Evidence.

1. Where there are several notes secured by a mortgage, neither has priority over the others by reason of maturing at an earlier date, but all have an equal claim to be paid ratably out of the land; citing *Cooper v. Ulmann*, Walk. Ch. 251; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Id. 447.
2. A mortgagee sold two of three mortgage notes, and assigned a corresponding interest in the mortgage, which fact was stated in the assignment. And it is held that parol testimony is inadmissible to show an alleged agreement that the assignee was to have a priority of lien under the mortgage as security for the payment of his notes.
3. The assignee of an interest in a mortgage corresponding to two of the three notes, which he had purchased, foreclosed the mortgage by advertisement, and on the expiration of the redemption year took possession of the mortgaged premises under his sheriff's deed. The assignor commenced a suit to foreclose his interest in the mortgage, and secured a decree setting aside the statutory foreclosure, and directing a sale of the land, and a division of the proceeds realized thereon between the assignor and assignee according to their respective interests. And it is held that the statutory foreclosure did not affect the relative rights of the assignor and assignee, but that, as the assignee had purchased the equity of redemption, he had the right to redeem from the lien of the assignor under the mortgage, and that, failing to do this within six months, the premises be sold as in ordinary foreclosure cases, and the moneys realized divided according to the respective interests of the parties.

Appeal from Berrien. (O'Hara, J.) Submitted on briefs October 30, 1890. Decided November 14, 1890.

Bill to foreclose a mortgage. Defendant Smith appeals. Reversed, and decree entered in this Court in accordance with the opinion, in which the facts are stated.

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George S. Clapp and *A. Plummer*, for complainant, contended for the doctrine stated in the opinion.

G. M. Valentine, for defendant Smith, contended:

1. A mistake in a written instrument, when proved to the satisfaction of the court, is good ground for refusing relief to which the complainant would otherwise be entitled; citing *Garlinghouse v. Dixon*, Walk. Ch. 440; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Reed v. Root*, 59 Iowa, 359; and it is competent for a mortgagee in making an assignment to give one or more installments priority over the others; citing *Cooper v. Ulmann*, Walk. Ch. 251.
2. If the court should find that there is a mistake of law in this case, it should relieve the defendant Smith therefrom under the circumstances of the case. The rule that courts will not relieve against mistakes of law has no application to mistakes in the language of a contract, or in the choice of forms of an instrument, whereby it has an effect different from that intended by the parties; citing *Stafford v. Fetters*, 55 Iowa, 484; *Reed v. Root*, 59 Id. 359; and courts will relieve against mistakes either of law or fact where great injustice has been or is about to be done; citing *Auditor General v. Supervisors*, 62 Mich. 592.
3. The assignment of the notes and mortgage did not operate as a payment of the amount due from Jennings to Smith, there being no specific agreement that it should have that effect; citing *Gardner v. Gorham*, 1 Doug. 507; *Dudgeon v. Haggart*, 17 Mich. 273; *Boom Co. v. Sanborn*, 36 Id. 358; *Hanson v. Donkersley*, 37 Id. 191.

LONG, J. The bill was filed in this cause to foreclose a mortgage upon real estate given by Mary L. Moore to the complainant.

The history of the transaction out of which this proceeding grows is, as set forth in the bill, that on May 9, 1874, complainant sold and conveyed 10 acres of land to defendant Mary L. Moore for the sum of $3,000, and she and her husband, Orrin E. Moore, gave complainant their notes for that amount. One note was for the sum of $500, due in one year, and there were two other notes, for the sum of $1,250 each, due in two and three years

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from date respectively, all drawing interest at the rate of 10 per cent. per annum. To secure the payment of these notes, Mrs. Moore made and executed a mortgage for $3,000 upon this 10 acres of land, and also upon 40 acres of other land. This 40 acres was also incumbered by a prior mortgage of $4,000.

Soon after the execution of this mortgage and the notes, Abram Smith, the other defendant herein, sold to complainant his farm, and took towards the purchase price thereof the two notes first to fall due given by Mrs. Moore, that is, the $500 and one of the $1,250 notes, Jennings retaining the other note. At the time of this purchase, Jennings made an assignment in writing to Smith of that part of the Moore mortgage represented by the two notes so transferred to him. This assignment specifically sets forth the interest in the mortgage which Jennings transferred to Smith, as that part of said mortgage represented by said first two notes. None of the notes were ever paid.

In December, 1875, Smith began foreclosure proceedings by advertisement, and on March 22, 1876, the premises consisting of said 10 acres were sold to Smith at sheriff's sale for the amount of the $500 note, interest, and costs. When the year for redemption expired, Smith took possession under the sheriff's deed, and has ever since been in possession of the premises, claiming title through the sheriff's deed. Jennings has never made any claim to the premises, or attempted to assert any rights under his note and remaining interest in said mortgage, until the commencement of this suit.

Defendant Smith in his answer substantially admits the facts set up in the bill, but avers that at the time he took the notes from Jennings, and received the assignment of such part of the mortgage, it was expressly agreed and understood that he was to have a lien under his two

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notes prior to any claim Jennings might have under the last note retained by him.

Testimony was taken in the cause, and Smith testified substantially to the facts set up in his answer. Complainant testified and claimed on the hearing that the purpose of the assignment was to sell to Smith only so much of the mortgage as secured the payment of the two notes sold to him, and that he (Jennings) still holds and owns an interest in the mortgage in the same proportion that his note bears to the whole debt; that is, that he holds and owns 5-12, and Smith 7-12, of the mortgage, and that his rights were in no manner affected by the foreclosure made by Smith. Mrs. Moore did not appear, and the bill was taken as confessed as to her.

On the hearing, the court below decreed that the foreclosure proceedings had by Smith by advertisement be set aside, and the premises be sold, the moneys arising from the sale to be divided between Jennings and Smith in proportion to their respective interests, that is, to Jennings five-twelfths and to Smith seven-twelfths. From this decree defendant Smith appeals.

The assignment does not state that Smith's two notes were to be held as prior liens over the note retained by Jennings. It does not purport to assign the whole interest which Jennings had in the mortgage, but only that part represented by the two notes given over to Smith. Whatever the understanding was as to which should have priority of lien cannot be shown except by the assignment itself. That was the agreement between the parties, and it cannot be changed or varied by parol evidence. Taking the assignment, then, as the agreement, it appears that Jennings was to and did retain five-twelfths of the mortgage, and only transferred to Smith seven-twelfths. This was an installment mortgage, and under the statute each installment must be taken and

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deemed a separate and independent mortgage. How. Stat. subd. 4, § 8498. While this is so, where these several distinct payments are thus secured by one mortgage, no one of them has any preference over the rest in consequence of falling due sooner, but all have equal claims to be paid ratably out of the land. *Cooper v. Ulmann*, Walk. Ch. 251; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Id. 447.

The foreclosure made by Smith in no manner, however, affected the rights of Jennings in the security. Neither had any preference over the other before such foreclosure, and no such preference was acquired by the proceedings to foreclose. It undoubtedly took away the rights of Mrs. Moore to the possession if the foreclosure proceedings were valid, but it in no manner adjusted the rights between Jennings and Smith. By the proceedings, Smith did not become the owner of the whole land, or any definite undivided interest therein, freed from the lien of Jennings' part of the mortgage. Though it operated as a foreclosure of the rights of Mrs. Moore, or any person claiming through or under her, yet Jennings' rights and interests were not changed under his mortgage lien, as his rights were in no way subordinate to those of Smith. But Smith having purchased Mrs. Moore's equity of redemption, he has the right to redeem from the lien under the Jennings portion of the mortgage. Failing in this within six months from this date, the premises will be advertised and sold as in ordinary foreclosure proceedings, and the moneys arising from the sale be brought into court and be distributed, under order of the court, between Smith and Jennings in proportion as the notes held by each bear to the whole amount secured by the mortgage.

The decree of the court below setting aside the mortgage foreclosure made by Smith will be reversed, and

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decree entered in the court below in accordance with this opinion, the case to be remanded to the court below for the purpose of carrying out the decree. Complainant will recover his costs.

The other Justices concurred.

WILLIAM D. LONGYEAR, INGHAM COUNTY TREASURER, v. MAYTON J. BUCK, CITY TREASURER OF LANSING.

Dog tax—Constitutional law—Damages to sheep breeders.

1. Act No. 214, Laws of 1889, providing for the payment by township and city treasurers to the county treasurer of the dog tax collected by them, to be kept as a special fund for the payment of losses suffered from the killing or wounding of sheep, is constitutional.
2. The following general propositions are summarized from the opinion of Mr. Justice LONG:
   a—Under the police power, the Legislature has, since the organization of the State, from time to time placed restrictions upon the keeping of dogs, and provided regulations for their keeping for the safety of individuals and sheep breeders in the care of their flocks.
   b—A constitutional provision for the taxation of property by *value* will not preclude a *per capita* tax on dogs.

Mandamus. Submitted October 31, 1890. Granted November 14, 1890.

Relator applied for *mandamus* to compel the payment of certain moneys in respondent's hands arising from the tax on dogs, under Act No. 214, Laws of 1889. The facts are stated in the opinion.

George F. Day, Prosecuting Attorney, for relator, contended:

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1. The law will be upheld, not as a tax, but as an exercise of the police power of the State; citing *Van Horn v. People*, 46 Mich. 183; *Hendrie v. Kalthoff*, 48 Id. 306; and where a license fee is levied for police purposes, there may be excellent reason for requiring persons living adjacent to a town to pay such fee; citing Cooley, Tax'n (2d ed.), 160, 161.

R. A. Montgomery, for respondent, contended as stated in the opinion, citing no authorities.

LONG, J. The relator is county treasurer of Ingham county, and presents his petition to this Court for *mandamus* to compel the respondent, who is city treasurer of the city of Lansing, to pay over certain moneys which came into his hands from a tax on dogs.

The answer of the respondent admits that he has in his hands the sum of $110.90 which came to his hands from such taxes, and that the time within which the same was to be paid over to the county treasurer, under the provisions of Act No. 214, Laws of 1889 (3 How. Stat. §§ 2132*a*–2132*e*), expired on March 31, 1890, and that demand has been made upon him for such payment. He refuses to pay the moneys over on the ground that he is advised that the act is unconstitutional and void.

At its session in 1877, the Legislature passed an act entitled—

"An act to provide for a tax upon dogs, and to create a fund for the payment of certain damages for sheep killed or wounded by them in certain cases." Act No. 198, Laws of 1877, How. Stat. § 2123 *et seq.*

Section 1 of this act provides that in all the townships, and wards of the cities, of this State there shall be annually levied and collected the following tax upon dogs: Upon every male dog, over six months old, owned or kept by any one person or family, $1; upon every female dog, owned or kept by one person or family, $3. The act provides for the assessment and collection of this tax each year. It is also provided that when any person shall sus-

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tain a loss by the killing or wounding of his sheep or lambs by a dog or dogs he may call upon a disinterested justice of the peace of his township to make a certificate of the amount of his damages. It becomes under this act the duty of the township board, or common council of cities, at the annual meeting in April, to examine such certificates, and to pay such losses out of the fund so raised, or, if the fund is not sufficient for such purpose, then to pay proportionately each claim. The validity of this act was attacked in *Van Horn v. People*, 46 Mich. 183, and the act was upheld. It was there said:

"It is plain, therefore, that the act can neither be brought within Article 14 [of the State Constitution] for the purpose of sustaining it or for the purpose of overthrowing it. It is a species of legislation which pertains to another department of power, and where the State in pursuing its duty to accommodate as far as practicable the desire and the right to keep dogs, to the more beneficial right of breeding and keeping sheep, has seen fit to apply the method marked out in this statute. The act is an exertion of the police power, and no reason is perceived for denying its validity."

Under the act above referred to, the fund derived was held by each township or city treasurer, and was payable on the order of the township board or common council of the city, each township or city being regarded as a separate district, and losses occurring in each district were to be paid out of the fund in that particular district. At its session in 1889, the Legislature amended the act of 1877 by adding four new sections, to stand as sections 11, 12, 13, 14. Section 11 provides—

"That all moneys collected within any city in this State, and any township, or part of township, next adjoining thereto (the same being within one county), under and by virtue of Act No. 198, Pub. Acts of 1877, as amended, * * * shall be paid by the treasurer of any such township, or part of township, and the treasurer of said city, respectively, to the treasurer of the

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county wherein the same are situate, within the time county and State taxes are required to be paid over to him, and the moneys so paid * * * shall be kept by him as a special fund for the payment of any loss or losses that any person may suffer from the killing or wounding of any sheep or lambs by a dog or dogs within any such city or any said township or part of township."

Section 12 provides that the township board of such township, or part of township, or common council of such city, shall examine all certificates for damages, and, upon allowance, the clerk shall draw an order upon the county treasurer for such moneys.

Section 13 provides that the county treasurer shall pay such orders if he has sufficient moneys in said fund, or, if not, then he shall pay the same *pro rata*.

By section 14 it is provided that if any moneys remain in said fund after the payment of all such orders, and the amount of said moneys shall exceed the sum of $200, the sum in excess of $200 shall be apportioned by the county treasurer to the township, or parts of township, and said city in proportion to the amount contributed by each during the preceding year, and the amount so apportioned to any township, part of township, or city shall be respectively apportioned among the several school-districts of said township, part of township, and city, in proportion to the number of children therein of school age.

It is contended by counsel for the respondent that the sole purpose of placing the money in the hands of the county treasurer is to create a fund to the advantage of one community as against the other; that is, that the act upon its face shows that the tax raised in the city upon dogs kept therein is by the act appropriated to the rural communities, and therefore is unconstitutional and void. The very considerations which counsel urge may have influenced the Legislature in passing the act, but

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those considerations do not render the act void. It is a matter of common knowledge that very many persons in cities and villages keep dogs, and that but few, if any, sheep are bred and kept therein. It is also as well known that dogs so kept often range beyond the view and control of their owners, and make excursions into the territory adjacent to these cities and villages, where sheep are bred and kept, and many sheep in the flocks so kept are worried, wounded, and killed. In consequence of the well-known liability of dogs to break through all discipline, and act according to their original savage nature, and because also of their liability to madness, it has been customary always to make dogs the subject of special and particular regulations. Under the police power, the Legislature has, since the organization of the State, from time to time placed restrictions upon the keeping of dogs, and by legislative enactment provided regulations for their keeping for the safety of individuals and sheep breeders in the care of their flocks. As was said in *Van Horn v. People*, 43 Mich. 186:

"As the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes no doubt of the character of a tax, and for many purposes might be so spoken of without harm."

But a constitutional provision for the taxation of property by value will not preclude a *per capita* tax on dogs. Such a tax can seldom prove burdensome; each person assesses himself in determining how many dogs he will own and keep. The fund arising from this source, which is imposed as a police regulation, may be appropriated by the Legislature to the purpose, in some measure, as a recompense to those who have suffered damages from these animals.

It is not contended, in view of former decisions of this Court and the courts of other states, that the Legislature

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may not make each township or city a district in which the fund may be accumulated for such purpose, and there is no force in the proposition that the district may not be enlarged to include the "territory adjacent to any city," and, in view of the well-known fact that these depredations are often committed in this adjacent territory by dogs kept in cities, there is no reason why the fund so collected should not be thus applied. Those who do not keep dogs are not interested in the fund, except they keep sheep; they have paid no part of it; and those who do keep dogs must expect that some restrictions shall be placed upon that right. The Legislature have said, "You may keep your dogs by the payment of this tax, and the moneys arising from the tax shall be distributed to those who, living in adjacent territory, and keeping sheep, have suffered from their depredations." It is a regulation which the Legislature had the undoubted right to make.

The writ of *mandamus* will issue as prayed.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. CAHILL, J., did not sit.

JOHN J. WIDIMAN v. JAMES A. BROWN.

Contract—Consideration.

An agreement to pay that which the promisor has already contracted to pay does not constitute a consideration for a *new* promise to perform the same contract.

Error to Wayne. (Hosmer, J.) Submitted on briefs October 31, 1890. Decided November 14, 1890.

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Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

William Stacey, for appellant.

Charles Flowers, for plaintiff.

LONG, J. This cause was commenced in justice's court in the city of Detroit, where plaintiff had judgment for $88.82. The plaintiff declared in an action of *assumpsit,* and filed the following bill of particulars:

Balance due on contract for building house	$60 00
Extra door	8 00
Glass for extra door	3 00
Two drawers, at $2.00 each	4 00
28 feet sidewalk	8 00
6 feet sidewalk to house	2 00
Two extra windows and glass	12 00
Total	$97 00

The defendant pleaded the general issue, gave notice of recoupment, and filed a bill of particulars as follows:

"Please take notice that the following is a bill of particulars of our claim for recoupment in this case, and for which we will claim damages on the trial:

For failure to put tar paper on the outside of the house, under the siding, as required by the contract	$100 00
For failure to properly complete the oil finish on the interior of the house	25 00
Total	$125 00"

From this judgment defendant appealed to the circuit court for Wayne county, where the cause was tried before a jury, and verdict and judgment passed for the plaintiff in the sum of $64.59. Defendant brings error.

The assignments of error all relate to the refusal of the court to charge as requested by defendant, and the charge of the court as given. The defendant, at the

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close of the testimony, requested the court to charge as follows:

"1. If you find from the evidence that, at the time the defendant paid the plaintiff the three hundred and fifty dollars, the plaintiff agreed to come back and put on another coat of oil finish, and then was to be paid the remaining sixty dollars due on the original contract, these facts constitute in law a new contract; and if you also find that the plaintiff did not return and perform said work, then your verdict must be for the defendant.

"2. If you believe from the evidence that the plaintiff did not complete the house according to the contract, then you must deduct from the claim of the plaintiff the amount necessary to put the house in the condition required by the contract.

"3. If you believe from the evidence that it will cost more to put the house in the condition called for by the contract than is due the plaintiff on the original contract, then you should render a verdict for the defendant for the amount necessary over and above the plaintiff's claim.

"4. The defendant did not waive his right to insist upon the completion of the house by taking possession of it.

"5. If you believe from the evidence that the defendant did not order the sidewalk built, then the plaintiff cannot recover for it.

"6. If you believe from the evidence that the plaintiff made the drawers charged for in his bill at the request of the defendant's wife, then the defendant cannot be made to pay for them.

"7. If you believe from the evidence that the plans and specifications called for the two windows charged for in plaintiff's bill of extras, then he cannot claim extra pay for them.

"8. If you believe from the evidence that there was a condition in the plans and specifications that the defendant was not to be charged for any extras, then he cannot be made to pay for any whatever."

It is claimed by the counsel for the defendant that none of these requests were given by the court, but, on a careful reading of the charge, it appears that each was

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given in almost the identical language of the request, except the first, which was not given. In considering the questions raised under the refusal of the court to give this request, it becomes necessary to examine the claims of the parties as put forth upon the trial. Plaintiff built a house for the defendant upon contract. The contract price was $1,410. It is conceded that, on the last day plaintiff worked on the house, defendant made him a payment of $350, leaving a balance of $60 due under the original contract. Plaintiff also made claim for some $37 for extras. It was for this $60 and the $37 for extras that this suit was brought. Defendant contended on the trial, and that is the contention here, that when the plaintff quit work on the house, and demanded his pay in full, he (defendant) protested that the oil finish was not properly done, and he refused to pay him any more money; that plaintiff then agreed if he would pay him $350 he could retain the remaining $60 until the plaintiff put on another coat of oil finish; that he then paid him the $350, but plaintiff never put on the other coat. It is claimed by the first request that this constituted a new contract, and that the court should have so instructed the jury.

Counsel for defendant cites several cases from this Court which he claims bear him out in this assertion, but in this counsel is in error.[1] It is well settled that an agreement to pay that which a party has already contracted to pay does not constitute a consideration for a new promise to perform the same contract.[2] If the facts are as defendant's counsel claims, it was simply an agree-

[1] *Ortman v. Green*, 26 Mich. 209; *Compton v. Blair*, 27 Id. 397; *Spicer v. Earl*, 41 Id. 191; *Goebel v. Linn*, 47 Id. 489; *Edwards v. Nelson*, 51 Id. 121; *Conkling v. Tuttle*, 52 Id. 630.

[2] Counsel for plaintiff cited, in support of this proposition, *Vanderbilt v. Schreyer*, 91 N. Y. 392.

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ment to pay the plaintiff the $60, which it is conceded was due under the original contract, when the building was completed. That is, the defendant claims that he agreed to pay plaintiff what he owed him if he would throw off the $37 for extras. Such a contract is without consideration, and cannot be upheld. *Vanderbilt v. Schreyer*, 91 N. Y. 392; Pol. Cont. 161; 1 Pars. Cont. 437. The court very properly instructed the jury upon this branch of the case as follows:

"If the plaintiff was required to put three coats of oil finish on the inside of the house, and three coats of oil finish were put on the inside of that house, and the work was done properly, the promise of the plaintiff to put on another coat would be a mere gratuity, and without consideration, and his failure, when he discovered that there were already three coats put on, to put on an additional coat, would not preclude him from the right to the full amount due under the contract."

The other questions raised under the charge of the court, as given, are purely questions of fact. The court very fully and fairly submitted the claims of the respective parties. The jury were specifically instructed that, if the plaintiff failed to complete his contract according to the specifications, the defendant would be entitled to recoup his damages.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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HELEN EDWARDS v. ALBERT CLARK AND RUSSELL A. CLARK.

Covenant—Breach—Outstanding lease—Evidence—Damages.

1. In an action for breach of covenant *parol* proof is inadmissible to show that an existing incumbrance was agreed by the parties to be regarded as in fact no incumbrance.
2. The following general propositions are summarized from the opinion of Mr. Justice MORSE:

   a—The doctrine established by *Vos v. Dykema*, 26 Mich. 399; *Perrin v. Lepper*, 34 Id. 292; *Hansen v. Prince*, 45 Id. 519; and *Haldane v. Sweet*, 55 Id. 196,—is that the deed passes to the purchaser the right to collect the rent from the tenant, who cannot prevent such collection by refusing to attorn to him.

   b—It is as usual, and certainly as competent, to covenant against known as unknown incumbrances or defects of title, and with such a covenant the purchaser is not called upon to exercise any diligence; citing *Smith v. Lloyd*, 29 Mich. 382.

   c—Where it is shown by parol that, after the delivery of a deed with a covenant against incumbrances, the grantee accepts an existing tenancy and receives the rent from the tenant, the amount of rent received is properly deducted from the damages found in his favor in an action for breach of such covenant by reason of such outstanding tenancy.

Error to Ingham. (Peck, J.) Submitted on briefs October 31, 1890. Decided November 14, 1890.

Covenant. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Russell C. Ostrander, for appellant, contended:

1. An outstanding leasehold interest is a breach of the covenant against incumbrances; citing *Jarvis v. Buttrick*, 1 Metc. 480; *Mills v. Catlin*, 22 Vt. 98; *Cross v. Noble*, 67 Penn. St. 74; *Porter v. Bradley*, 7 R. I. 538; *Christy v. Ogle's Exr's*, 33 Ill. 295; *Weld v. Traip*, 14 Gray, 330; *Pease v. Christ*, 31 N. Y. 141.

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H. B. Carpenter, for defendants, cited the cases referred to in the opinion.

MORSE, J. The plaintiff traded a house and lot in the city of Lansing, heavily mortgaged, for a farm in Wheatfield township, also largely incumbered, and which mortgage was then in process of foreclosure. The deed of defendants conveying the farm was, in form, a usual warranty deed. The covenant against incumbrances is full and without limitation against "all incumbrances whatever;" but, in the covenant to warrant and defend against lawful claims, the mortgage then being foreclosed is mentioned and excepted.

At the time the trade was made, one Bellinger was in possession of the farm under a verbal agreement with defendants. The plaintiff claimed that, when she received the warranty deed of the defendants, Albert Clark told her that Bellinger had no right to stay upon the premises any longer than until such time as defendants should make a sale of the farm; that the agreement between him and defendants was that his lease should terminate as soon as a sale of the premises was made. Defendants claimed that they informed plaintiff that Bellinger was obliged to leave, under the terms of his lease, as soon as a sale was made and his interest in the crops was purchased; if such interest was not purchased, then he would be entitled to remain and harvest them. Upon this conflict of claims, the jury found with the plaintiff.

The exchange of property took place May 9, 1889. Notice was given Bellinger May 10, 1889, and possession demanded, but he refused to leave the premises, and remained upon them until he harvested his crops in the fall. In proceedings taken by plaintiff to recover possession from Bellinger before a circuit court commissioner the decision was against plaintiff, June 22, 1889. June

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24, 1889, plaintiff served a notice upon defendants of the result of such proceedings, and in such notice informed them that she claimed immediate possession of the premises under her deed, and that, unless it was secured to her, she would bring an action against them for breach of the covenants of such deed; and authorizing them to use her name in any proceeding they might choose to regain possession. Defendants failing to take any steps to secure the possession to her, she, on January 7, 1890, commenced this suit for damages for breach of covenant against incumbrances. Upon the trial, plaintiff showed the rental value of the premises to be $180 per year. Under Bellinger's arrangement with the defendants, he delivered one-third of the crops to them. Plaintiff made no effort to obtain this one-third after she purchased the premises, but treated Bellinger as upon the land without right. The circuit judge instructed the jury that, by the warranty deed, defendants transferred to plaintiff the right which they had to collect and receive one-third of the crops grown upon the place by Bellinger, and that, in determining the damages, they must deduct, from the rental value for the time that Bellinger kept plaintiff out, the amount of the value of one-third of the crops harvested by him during such time.

This instruction is assigned as error. The position of the defendants in support of the judgment is that the plaintiff, by accepting the deed with Bellinger upon the premises, acquired all the rights as landlord that defendants had, and assumed all the responsibilities; that where land is conveyed in the possession of another, and the rent passes to the grantee as an incident of the reversion, it would seem impossible to call such a lease an incumbrance. Counsel cite, to sustain this position, Rawle, Cov. § 78; *Lindley v. Dakin*, 13 Ind. 388; *Page v. Lashley*, 15 Id. 152; *Kellum v. Insurance Co.*, 101 Id.

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455; *Vos v Dykema*, 26 Mich. 399; *Perrin v. Lepper*, 34 Id. 292; *Hansen v. Prince*, 45 Id. 519 (8 N. W. Rep. 584); *Haldane v. Sweet*, 55 Id. 196 (20 N. W. Rep. 902). The cases cited from our own Court do not touch the point in issue here. They simply establish the doctrine that the deed passes to the purchaser the right to collect the rent from the tenant, and that such tenant cannot prevent such collection by refusing to attorn to him. In Indiana, parol proof is held admissible to establish that an existing incumbrance was considered by the parties not to be embraced within the covenants against incumbrances. But the extent to which the cases cited in that state go is that, where a purchaser takes such covenant with the knowledge of the tenant's possession and *title*, the lease will not be considered a breach of the covenant, and where no special contract is made the occupant becomes tenant to the purchaser. *Lindley v. Dakin*, 13 Ind. 388; *Page v. Lashley*, 15 Id. 152.

In this case, if parol proof was admissible to vary or rebut the covenant in the deed, still the circuit judge was wrong in his instructions to the jury, because the plaintiff, under her theory, was informed that Bellinger had no right to occupy the premises for a moment after notice of the sale, and she never recognized any right in Bellinger to remain on the premises, and never accepted him as her tenant. But in this State no parol proof is admissible in an action upon covenants to show that an existing incumbrance was to be regarded in fact as no incumbrance. "It is as usual, and certainly as competent, to covenant against *known* as unknown incumbrances or defects of title;" and, with a covenant of this kind, the purchaser is not called upon for the exercise of any diligence. *Smith v. Lloyd*, 29 Mich. 382, 389. And it is said that the fact of the purchaser having notice of an incumbrance is the very

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reason for his taking a covenant within whose scope it is included. Rawle, Cov. (5th ed.) pp. 112–115, and cases cited in notes. Of course, if it could be shown by parol that, after the deed was delivered, the purchaser accepted the tenancy and received the rent from the tenant, the amount of such rent would be a proper deduction from the damages found upon the breach of the covenant; but it is not admissible to hold such purchaser liable for rent that he did not collect under a tenancy or holding that he never recognized or acknowledged.

The judgment is reversed, with costs, and a new trial granted.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. CAHILL, J., did not sit.

ADDISON P. BREWER v. ALLEN GEROW, COMMISSIONER OF HIGHWAYS, AND JOSHUA WILSON, CLERK, OF THE TOWNSHIP OF SHERIDAN.

Highways—Proceedings to establish—Town-line road.

Proceedings for laying out a township-line road must be taken *jointly* by the highway commissioners, under How. Stat. §§ 1296, 1305, and such action by one commissioner is void.

Certiorari to review proceedings in laying out a township-line highway. Argued October 31, 1890. Proceedings quashed November 14, 1890. The facts are stated in the opinion.

C. W. Perry, for petitioner.

MORSE, J. The proceedings to be reviewed in this

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case were taken for the purpose of laying out and establishing a highway on the town line, between the townships of Sheridan and Grant, in the county of Clare.

The petition, which is the foundation of the proceedings, was signed by the requisite number of freeholders from each of the townships, but the further action taken was by the commissioner of highways of the township of Sheridan alone, and to whom the petition was directed.

The statute provides that highways upon township lines must be laid out by the joint action of the commissioners of both townships, and the proceedings of such commissioners must be filed and recorded in both townships, with the township clerk. How. Stat. §§ 1296, 1305.

The proceedings are illegal and void, and must be quashed, with costs.

The other Justices concurred.

HANNAH E. COOK v. JOHN H. BURNETT.

83	251
116	607
83	251
152	[2]443

Appeal—Findings of court—Exceptions—Assignments of error.

1. An exception to a conclusion of law is indispensable to its review in the Supreme Court. *McMillan v. Cheese Factory*, 23 Mich. 544.
2. A finding of fact, if supported by *any* evidence, is conclusive, and a party failing to except to a finding of law is regarded as acquiescing therein.
3. The judgment in this case is affirmed, it not being assigned as error that the facts found do not support the judgment.

Error to Cass. (O'Hara, J.) Argued October 31, 1890. Decided November 14, 1890.

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Replevin. Plaintiff brings error. Affirmed. The facts necessary to a decision of the case are stated in the opinion.

O. W. Coolidge, for appellant.

Howell & Carr, for defendant.

CHAMPLIN, C. J. This cause was tried before the court without a jury, and the circuit judge made written findings of fact and his conclusions of law thereon. No exceptions were taken to either the findings of fact or of law. The case is brought here by bill of exceptions and writ of error.

The errors assigned relate exclusively to the findings of law, and to the court's refusal to find certain conclusions of law requested by plaintiff. In *McMillan v. Cheese Factory*, 23 Mich. 544, there were written findings of fact and law, but no exception was taken to the findings of fact, nor to the conclusions of law embodied in them. Errors were assigned as to the law. This Court held as follows:

"There is no exception to the conclusion of law complained of. This is indispensable to a review of such conclusions by this Court."

And in *Peabody v. McAvoy*, Id. 526, it was held that a finding of fact which is supported by any evidence is conclusive, and that a finding of law is not reviewable in this Court unless excepted to as required by our practice; and when a party fails to except to a specific finding, he is regarded as submitting to it.

There is no allegation of error in this case that the facts found do not support the judgment. It follows

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that there is nothing in the record which we are authorized to consider upon a writ of error, and the judgment must be affirmed.

The other Justices concurred.

THE THREE RIVERS NATIONAL BANK v. SARAH A. GILCHRIST.

83	253
125	606
83	253
128	568
83	253
s47NW	104
131	295
83	253
142	438
83	253
150	266

Husband and wife—Proof of agency.

The authority of a husband to act for his wife cannot be shown by his declarations, nor will it be presumed from the circumstance that he has acted for her in other matters, but it must be established, like any other fact, by competent evidence; citing *Fechheimer v. Peirce*, 70 Mich. 440.

Error to St. Joseph. (Loveridge, J.) Argued October 31, 1890. Decided November 14, 1890.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

S. M. Constantine, for appellant, contended as stated in the opinion, citing the authorities therein cited.

Pealer Bros., for plaintiff. Brief is confined to a discussion of the testimony, no authorities being cited.

CAHILL, J. This action was brought on a promissory note of $300, signed by Sarah A. Gilchrist and her husband, J. M. Gilchrist. The note sued on was the last of several renewals of a note for the same amount given originally in August, 1884. The defense on the part of Mrs. Gilchrist is that she was a married woman living

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with her husband, and that she signed the note as surety for her husband. The case was tried before the court without a jury, who found that the original note and its renewals were given by Mrs. Gilchrist for her own debt, and that she did not sign the same as surety for her husband. A judgment was entered for the plaintiff. Defendant excepted to the finding that there was no evidence to support it, and that is the only question we have to consider.

A careful examination of the record shows that the plaintiff put in evidence tending to prove that in August, 1884, Mr. Gilchrist went to the plaintiff's bank, and said that he wanted to borrow $300 for Mrs. Gilchrist; that she wanted the money to invest in property; and that she was going to use it in paying for such property. Mrs. Gilchrist did not go personally to the bank at the time the original note was made, nor at any time when it was renewed; Mr. Gilchrist doing all the business. After the notes were made out, Mr. Gilchrist took them to his wife for her signature, and returned them to the bank. Mr. Gilchrist always paid the interest on the notes. None of the officers of the bank saw Mrs. Gilchrist in relation to the loan, or the renewals, until just before this suit was brought, when Mr. Pealer, as attorney for the plaintiff, called on her for the purpose of securing it. He says:

"She raised no question as to its being her obligation or note. I will state that there was nothing said by her about the claim not being hers, or anything of the kind. * * * The question of the original loan did not come up at all. I told her I wanted to get security."

There was evidence also tending to show that Mr. Gilchrist had acted as agent for his wife in building the house in which they lived in the season of 1883, also in borrowing money that went into the house by mortgages

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on his wife's land, and that he had acted for her generally in relation to her business. But there was no evidence that her husband had authority to borrow this money for Mrs. Gilchrist, or that he did borrow it for her benefit, except the evidence of the officers of the bank as to what Mr. Gilchrist himself said about it. The authority of Mr. Gilchrist to act for his wife cannot be legally shown by proof of his own declarations on that subject. *Hatch v. Squires*, 11 Mich. 185; *Kornemann v. Monaghan*, 24 Id. 36; *Bond v. Railroad Co.*, 62 Id. 650; *Willard v. Magoon*, 30 Id. 278, 280.

The authority of a husband to act for his wife in the matter of making a loan will not be presumed from the circumstance that he has acted for her in other matters, but must be proved, like any other fact, by competent legal evidence. *Fechheimer v. Peirce*, 70 Mich. 440. The evidence of other transactions in which Mr. Gilchrist acted for his wife had no legal tendency, standing alone, to prove his authority to act in this particular case, and such evidence should have been disregarded. Mr. Gilchrist and his wife both testified that this money was not borrowed for the benefit of the wife, but that it was borrowed by Mr. Gilchrist for his own use; that she signed the note as surety for him. This evidence would not weigh with us in deciding the case, if there were any evidence to the contrary in the record; but, upon the whole case, we feel compelled to say that the judgment must be reversed, and a new trial granted.

The other Justices concurred.

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83	256
94	600
83	256
96	295
83	256
106	388
83	256
111	358
83	256
119	288
83	256
135	1456

JOHN ABBOTT v. FRANK CHAFFEE.

Assignment for benefit of creditors—Failure to file bond—Fraudulent conveyances—Trover—Practice in circuit court—Objections to testimony.

1. It is the duty of an attorney who objects to the admission of testimony to state the grounds of his objection, and unless this is done the objection will not be considered in the Supreme Court.
2. The failure of an assignee under an assignment for the benefit of creditors to file the statutory bond will not entitle a mortgagee whose mortgage is fraudulent as to creditors to recover in an action of trover brought against the assignee for the value of the mortgage interest in the assigned property.
3. The filing and approval of a bond by an assignee under an assignment for the benefit of creditors after the statutory ten days will not operate to vest in him the title to the assigned property.

Error to Ingham. (Peck, J.) Submitted on briefs October 31, 1890. Decided November 14, 1890.

Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

Kilbourne & Humphrey, for appellant.

Frank L. Dodge and *R. A. Montgomery*, for plaintiff.

GRANT, J. This is an action of trover brought by plaintiff as assignee of a chattel mortgage executed by one Elijah D. Kitchen to Francis M. Dodge for the sum of $400. Kitchen was insolvent, and made a general assignment to defendant, Chaffee, for the benefit of his creditors. Defendant took possession of the mortgaged goods, and disposed of them prior to the commencement of suit. The defense was that the mortgage was fraudulent as to

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the creditors of Kitchen. The court directed a verdict for plaintiff, for the reason that defendant's bond had not been executed and approved, as required by law. The assignment was dated December 31, 1886. Defendant executed an assignee's bond on January 10, 1887. The bond was approved by the circuit court commissioner, but does not appear to have been filed with or approved by the clerk of the court.

It appears that defendant, after his supposed qualification as assignee, filed a bill in chancery to set aside this mortgage as fraudulent. That case came on to be heard upon pleadings and proofs, and the bill was dismissed. Thereupon plaintiff, the defendant in the chancery suit, immediately made a demand upon the defendant for the return of the goods, and upon refusal brought this suit. The only testimony in this case was that taken in the chancery case. When that testimony was offered in evidence by the defendant the attorney for plaintiff said:

"Let the stenographer note the fact that all the testimony taken in the case of Frank Chaffee, assignee of Elijah D. Kitchen, insolvent, against Francis M. Dodge, and John Abbott, the plaintiff in this case, is received as the testimony in this case, and subject to our objection, together with all the exhibits; that it is objected to, objection overruled, and exception taken."

What the objection was, does not appear. We cannot commend this practice. It is the duty of the attorney objecting to state the grounds of his objection, and unless this is done the objection will not be considered in this Court.

The circuit judge directed a verdict for the plaintiff, upon the ground that the statutory bond was not approved and filed, as required by law. The statute under which this assignment was made, so far as the bond is concerned, is as follows:

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"Such assignment shall convey to the assignee all property of the assignor not exempt from execution, and all rights, legal or equitable, of said assignor: *Provided*, That no such assignment shall be effectual to convey the title to the property of the assignor to the assignee until such bond shall be executed, filed with, and approved by said clerk" (meaning the clerk of the circuit court). How. Stat. § 8739.

This bond is required to be executed, approved, and filed within 10 days after the making of the assignment. Failing in this, no title passes to him. *Beard v. Clippert*, 63 Mich. 716 (30 N. W. Rep. 323); *Springett v. Colerick*, 67 Id. 362 (34 N. W. Rep. 683). It is apparent, therefore, that the defendant did not have the title to the property when this suit was commenced. The filing and approving of a bond afterwards did not cure the defect.

But if it be a fact that this mortgage was fraudulent, and made without consideration, the plaintiff was not entitled to recover, even though the defendant had no title under the assignment. In this action the defendant might show title in a third person, and stranger to the action. *Ribble v. Lawrence*, 51 Mich. 569 (17 N. W. Rep. 60); *Seymour v. Peters*, 67 Id. 415 (35 N. W. Rep. 62). Kitchen, the mortgagor, voluntarily placed the property in the possession of the defendant. He, as well as the creditors, had assented to defendant's possession, and consented to the disposal of the property according to the terms of the assignment. If Kitchen had been in possession of the property, he could have defended against the mortgagee, on the ground of fraud and want of consideration. Plaintiff's title depended upon the validity of his mortgage. Defendant was rightfully in possession as against those having no title or valid lien upon the property. Other than those, Kitchen and his creditors are the only ones who can dispute the defendant's right of

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possession. Under the authorities above cited, the defendant was entitled to make the defense.

Judgment reversed, with costs, and new trial ordered.

The other Justices concurred.

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OSCAR F. PHILLIPS v. SARAH PHILLIPS.

Deed—Delivery—Fraud—Contract—Specific performance

1. In a suit involving the alleged delivery of a deed on Sunday there was a direct conflict in the testimony, which was taken in open court; and the conclusion of the circuit judge in favor of the validity of the deed is affirmed on appeal.
2. This case involves the question of the performance of an antenuptial agreement for the conveyance of an undivided interest in land by the man to the woman, and the execution by her to him of a life-lease, which contract has been performed on his part, and a decree is entered for a specific performance on her part.

Appeal from Ionia. (Smith, J.) Submitted on briefs October 31, 1890. Decided November 14, 1890.

Bill to set aside deed on the ground of fraud, and for general relief. Complainant appeals. Decree reversed, and one entered in this Court securing to complainant a life-lease in the property conveyed. The facts are stated in the opinion.

Davis & Nichols, for complainant.

Bennett & Benschoter, for defendant.

GRANT, J. Complainant and defendant were married March 13, 1887. Their courtship began about a year prev-

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ious. Their agreement to marry was made in May, 1886. At that time both were married, and each had commenced a suit for divorce, which suits were then pending. Their agreement was of course conditioned upon the success of these divorce suits, which were finally decided in their favor.

Prior to their marriage they made a contract by which complainant agreed to execute and deliver to defendant a deed of an undivided one-half of 95 acres of land, and defendant ageed to execute to complainant a life-lease of the same land. Complainant executed and delivered the deed, which was dated and acknowledged March 12, 1887. Complainant asserts that it was delivered on Sunday, the 13th, the day of their marriage, while defendant asserts that it was delivered on the Saturday before. The testimony on this point is in direct conflict, with the presumption against complainant, and the burden of proof upon him. The circuit judge saw the witnesses, and heard their testimony. He was therefore in a much better position than is this Court to ascertain the truth. We will not therefore disturb his conclusion in this respect that it was delivered on the 12th.

After their marriage, complainant and defendant lived together, but not very happily, till September 14, 1888, when she left him, and filed a bill for divorce. October 9, 1889, complainant filed this bill, alleging that defendant entered into a wicked scheme to defraud him; that he was an old man, 66 years of age; that, she was 46, and a woman of more than ordinary ability; that he was induced to and did execute said deed by reason of the improper and fraudulent use of her influence and control over him; and that she refused to carry out the agreement by executing the lease. The prayer of the bill is that the deed may be set aside, and for general relief.

Defendant denies that she agreed to execute a life-

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lease. But we think a fair preponderance of the evidence settles this question in favor of complainant. Disinterested witnesses testify that she admitted that such was the arrangement, and that when the lease was drawn and presented to her to sign she asked for further time to consider it.

While there is testimony in the case tending to show that defendant married complainant rather from mercenary motives than from love or affection, yet there is nothing in the record to warrant the conclusion that his intellect or will had become enfeebled by age, or that the execution of the deed was obtained by any improper or undue influence. Both understood the situation fully. They had known each other for 20 years. The terms of the agreement were discussed frequently, and the reasons stated why she wanted the deed. Both understood the full purport of the arrangement, and deliberately made it. He fully executed it by the marriage and delivery of the deed. She violated it by refusing to execute the lease. Neither is deserving of much consideration by a court of equity. Equity has done all it can or ought to do when it shall have decreed the specific performance of the antenuptial contract, which he fully, and she only partially, performed. Their post-nuptial rights depend entirely upon their conduct towards each other after marriage, and they must be determined by the court of chancery in the divorce suit which is still pending.

The decree of the court below must be reversed, and decree entered in this Court for complainant securing to him a life-lease of the property. Complainant will recover the costs of both courts.

CHAMPLIN, C. J., CAHILL and LONG, JJ., concurred. MORSE, J., did not sit.

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83 262
94 595

ORION W. DAMON v. SIM DEBAR AND OTTO FRELITZ.

Bills and notes—Promise to receive chattels in payment—Consideration.

A promise by the payee in a note, made after its maturity, to receive in payment 200 posts for $10, and apply the same upon the note, the maker agreeing to get out the posts as soon as his fall's work was done, and have them ready for delivery upon his farm, is without consideration, and of no validity until performed by the delivery and acceptance of the posts.

Error to Saginaw. (Gage, J.) Argued November 11, 1890. Decided November 14, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Lawson C. Holden, for appellant.

Trask & Smith, for defendants.

GRANT, J. This case originated in justice's court upon a promissory note for $25, dated May 8, 1888. Plaintiff recovered judgment for $10.28, being the balance due upon the note. Defendants appealed to the circuit court, where verdict and judgment were rendered in their favor, and plaintiff appealed to this Court.

The only defense is that the plaintiff promised, after the note became due, to receive in payment 200 posts for $10, and apply the same upon the note, and that defendant DeBar promised to get them out as soon as his fall work was done, and to have them ready upon his (De Bar's) farm. This was a mere naked promise without any consideration, and was of no validity until it had been fully performed by the delivery of the posts, and

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the acceptance by plaintiff. While the posts were lying with others in DeBar's field, according to his testimony, they were burned. There had been no acceptance by plaintiff of these posts in payment. The circuit judge should, therefore, have instructed the jury to render a verdict for the plaintiff.

Judgment reversed, with costs, and new trial ordered.

The other Justices concurred.

CHARLES SCHUFFERT v. CLARA GROTE

83 263
144 591

Equity—Appealable orders.

An order dissolving a preliminary injunction in so far as it interfered with the right of possession of land by the defendant, she being in such possession at time of the commencement of the suit, and directing that complainant restore the premises to the defendant, whose possession had been disturbed by him under said injunction, is not an appealable order.

Appeal from Wayne. (Brevoort, J.) Argued November 11, 1890. Decided November 14, 1890.

Bill to restore a lost deed. Complainant appeals from an order dissolving a preliminary injunction, and restoring defendant to her possession of the land. Order held not an appealable one, and appeal dismissed. The facts are stated in the opinion.

E. S. Clarkson, for complainant.

James H. Pound, for defendant.

CAHILL, J. Complainant filed a bill in the Wayne circuit court to restore a lost deed of lots 13, 14, and 15,

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of block 30, in the village of Wyandotte, claimed to have been executed to him by Christian Schuffert, the father of complainant, in his life-time. At his death the deed was not found, but another deed to the defendant of lot 14 was found in the possession of defendant, and put upon record. The complainant claimed in his bill that, at the time of filing the same, he was in the actual possession of the property in question, but alleged that defendant, by virtue of her deed, claimed to own lot 14, and intended to take possession, and dispossess the complainant. The bill asked for an injunction to restrain the defendant from interfering with complainant's possession or rights. An injunction issued as prayed. Upon the coming in of the answer denying the statements of the bill, and on motion of defendant's solicitor, the following order was made:

"In this cause, the motion to dissolve the preliminary injunction heretofore issued in this cause coming on to be heard, and the counsel for the respective parties having been duly heard thereon, it is ordered that the temporary injunction heretofore issued in this cause be, and the same is hereby, dissolved so far as it interferes with the right of possession of the defendant, or right to go to or come from said property, described in the bill of complaint, or so far as the same may affect her doing with the same as she pleases, except conveying the same, with the costs of this motion.

"And this court being satisfied that, at the time of the commencement of this suit and prior thereto, defendant was in possession of the premises described in the bill of complaint, it is ordered that, her possession being disturbed by the complainant under and by virtue of said injunction, said complainant restore said premises to said defendant forthwith, upon service of a copy of this order, without prejudice to his taking any legal steps to assert any claim of his to said premises, said service to be made personally upon the complainant."

From this order the complainant appeals. We held on the argument that the order was not such a final order

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as would justify an appeal to this Court, and that the appeal must be dismissed. Such an order will now be made, with costs.

The other Justices concurred.

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THE FORT-STREET UNION DEPOT COMPANY v. MARY H. ST. CLAIR MORTON ET AL.

Union depot companies—Constitutional law—Eminent domain—Oath to jury—Title of act.

1. The Union Depot Act of 1881 (Act No. 244) is not unconstitutional in that it confers the power of eminent domain upon the corporations organized under it, and the title is sufficient to warrant the conferring of such power.
2. The objection that section 30 of the Union Depot Act of 1881 embraces an object not stated in its title, namely, the establishment, maintenance, and operation of railroads independent of depot purposes, and having no connection therewith, is untenable.
3. The following oath to the jury in condemnation proceedings under the Union Depot Act of 1881 is sufficient, namely, that they would "justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause."
4. There is no force in the contention that the Union Depot Act of 1881 does not contemplate more than one union depot in each city or village.

Appeal from Wayne. (Full bench.) Argued October 7, 1890. Decided November 21, 1890.

Proceedings to condemn land for union depot purposes under Act No. 244, Laws of 1881. Respondents appeal from an award of $86,000 in their favor. Pro-

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ceedings affirmed, and appeal dismissed. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson (*Don M. Dickinson,* of counsel), for respondents.

F. A. Baker and *James F. Joy* (*C. B. Lothrop,* of counsel), for petitioner.

MORSE, J. This is a proceeding taken to condemn lands to the public use.

The petitioner is a union depot company, organized under the Union Depot Act of 1881. The property in question in this case is a part of lands and premises claimed by the petitioner to be required for its depot and station grounds. In the court below, a jury rendered a verdict that it was necessary to take the property for the public use, and that the respondents were entitled, as a just compensation therefor, to the sum of $86,000. The respondents appeal to this Court. The grounds of such appeal, as summarized by their counsel, are as follows:

"1. The Union Depot Act of June 9, 1881, in so far as it confers the power of eminent domain, is unconstitutional and void, for these reasons:

"*a*—The proposed use of lands by a corporation which is independent of the railroad laws of the State, and thus is discharged from the obligations imposed by law upon railroad transportation, is not a public use.

"*b*—The act does not confer upon the public at large any right to make use of the proposed passenger depot and freight warehouse, on any terms; much less are the terms for such use to the public defined, so as to be certain, beyond doubt, and without condition.

"*c*—Even if the terms to railroad companies were fixed and certain, railroad companies are not the 'public' contemplated by the Constitution. The use, and the terms for the use, must be for the people at large.

"*d*—The purpose of the act is not stated in its title.

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"*e*—The oath for the jury prescribed by the statute does not cover their constitutional duty.

"2. The act does not contemplate more than one union depot in each city or village, and this corporation is not within the clear purposes of the act requiring such companies to provide for all companies entering the city desiring such accommodations.

"3. The testimony in the case clearly shows that there is no necessity for taking this property for the public use, and there is no legal evidence to the contrary."

The main argument against the constitutionality of the act conferring the power of eminent domain upon these companies (see Laws of 1881, p. 320; How. Stat. p. 888) is based upon the proposition that they must acquire such power entirely from the act itself; that the union depot company is not a railroad company; it is not a common carrier; it is a new artificial person, deriving all its rights and powers, and finding absolutely all its obligations, in this, its organic act. Therefore, it is argued, it is clearly independent of, and not affected by, the body of the railroad laws and amendments embraced in chapters 91 and 92, How. Stat., which confer rights and privileges upon railroad companies, and also provide certain and clearly-defined reciprocal duties to the people, the imposition of which duties by law is the criterion which makes the use for railroad purposes a public one. It may be admitted for the purposes of this case that so far the contention of counsel is correct, and that we must look to the act itself to support the claim of the company to the right to acquire lands by condemnation for public use.

But, going further, the counsel also claim that in this act nothing can be found conferring upon the public at large any rights in the contemplated passenger depots and freight-houses; that the people at large—the common public—are given by this statute no fixed and definite

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rights in these depots; and that there is nothing to prevent the companies organized under it from charging what they please for depot services to the public at large. It is said that the provisions of the statute apply only to dealings between the depot companies and the railroad companies who may use the property of the former companies; that this company, for instance, "may shut its doors against the approaching passenger unless he pays its price to go in;" and that "there is nothing in the act to compel it to open its passenger depot or its freight-house at all to the community in which it is proposed to erect this structure;" that the act only provides for those entering the same by the railroads that terminate or connect with it.

The argument is, if we understand it, that the public at large have no rights specified by the act unless they act and use the same under the privileges granted to the railroads. It appears from the record that the Fort-street Union Depot Company was organized for the purpose of furnishing depot and terminal facilities for four different railroad corporations, and for all other railroads that may hereafter desire admittance thereto. The four companies now interested are the Flint & Pere Marquette Railroad Company, the Detroit, Lansing & Northern Railroad Company, the Wabash Western Railroad Company, and the Canadian Pacific Railroad Company. It would seem that a depot built to accommodate all the railroads coming into Detroit, or any considerable number of them, and to be used by them for the same purposes that any one railroad company would use its own single depot, would be when so used, without question, put to a public use, as it has long been settled that a railroad company may acquire, by the right of eminent domain, grounds for its depots and station-houses; and this right is not questioned by the counsel for respondents. The

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act (section 6) confers, in express terms, this right upon companies organized under it, and provides that such right shall be exercised, and title acquired to the lands sought, in the manner and by the special proceedings prescribed in the act. How. Stat. § 3463. Section 28 of the act provides that— . .

"All companies formed under this act shall, for a reasonable compensation, provide suitable depot accommodations for the passengers and freight of the railroads terminating or connecting with it, or desiring access thereto; and shall provide suitable tracks therefor without discrimination in favor of or against any of such roads. If the corporations cannot agree upon the terms and conditions upon which such accommodations shall be furnished, and the business transacted, the Commissioner of Railroads shall determine the rate of compensation to be paid for the accommodations required, which shall be uniform to all such railroad companies; but no such rate shall be fixed as will reduce the net annual income of the business of said company to less than seven per cent. on the cost of the property so used.

"SEC. 29. Companies formed under this act shall not at any time charge or receive for warehouse or elevator service or use more than the average rates then prevailing at the cities of Toledo, in Ohio, and Port Huron, in Michigan; for like service or use. * * * *

"SEC. 30. Any union railroad station and depot company may, and whenever it is expedient and such trains will pay the expenses thereof, *shall*, put on local passenger trains to do a local and suburban passenger business, and for such local business upon or to the end of its tracks shall be entitled to charge for each passenger not exceeding four cents per mile; and upon the application of any ten suburban citizens for the establishment of such trains, unless the said company comply with the request, it shall be, upon the same request to the Commissioner of Railroads, competent for him to investigate and determine whether such trains shall be established, and, if in favor thereof, it shall be the duty of such company to establish and maintain them so long as he shall require it to be done." How. Stat. §§ 3485-3487.

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It seems to me that the rights of the public to use the depots of these companies, their freight-houses and elevators, and, in certain cases, their trains, which under certain conditions they must operate, is fixed, definite, and certain. The public at large have the same rights in them as they have in the depots and freight-houses and cars of railroad companies in this State; and the representative of the public, the Commissioner of Railroads in this State, is given powers of control and regulation over them. Their charges must be reasonable, and the maximum is under State control, as in the case of railroads. No additional charges can be imposed upon the public by any railroad company contracting with the union depot company, by reason of its agreement with such depot company, while the public is benefited, as well as the railroad companies, by increased facilities of travel and transportation. That a union depot like the one sought to be established by the petitioner in the city of Detroit would be of great and incalculable public benefit, no one who reads this record can doubt. The act stamps the property to be taken with a public character, and imposes upon it a trust for the public use, which cannot be divested by any act of the corporators of the company. The law of its existence plainly prevents it from becoming a mere private corporation, or from disregarding its public uses.

The title of the act is as follows:

"An act to authorize the incorporation of companies for the construction of union railroad stations and depots, with the necessary connecting tracks and the management of the same."

It is contended that the title is not sufficient to warrant the authority given in the body of the act to acquire land by condemnation for public use; and, secondly, that section 30 of the act embraces an object not stated in

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the title,—to wit, the establishment, maintenance, and operation of railroads independent of depot purposes, and having no connection with such purposes. Neither of these objections to the title is good. The acquiring of land is a necessary precedent to the construction of depots and railroad tracks, and the means by which it is to be acquired, and the power granted to acquire it, need not be stated in the title; and the operation of local trains, under section 30 of the act, is confined to its tracks. This object is stated in the title as follows: "With the necessary connecting tracks and the management of the same." And the building of these tracks in connection with the depot, and the running of trains upon them, are all a part of the same general object as the construction of the depots and station-houses of the company, to wit, the increasing of the facilities and comforts of travel and transportation of passengers and freights.

It is further contended that the oath for the jury, as prescribed by the statute, does not cover their constitutional duty. The statute (section 9) provides that the jury—

"Shall take and subscribe an oath that they will justly and impartially ascertain and determine the necessity of taking and using any such real estate or property for the purposes proposed." How. Stat. § 3466.

Section 3464 (section 7 of the act) provides that the petition filed for the purpose of acquiring such lands must state, among other things,—

"That the property described in the petition is required for the purposes of its incorporation, and that the taking thereof is necessary for public use." p. 493.

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The oath actually taken by the jury was that they would—

"Justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause."

We think the whole act taken together requires that the oath to the jury should be that they will determine the necessity of taking the land for public use; and, as such was the oath taken here, the law has been fully complied with. The act is not unconstitutional, as How. Stat. §§ 3464, 3466, taken together, require the oath of the jury to be as it was in this case. *Grand Rapids v. Railroad Co.*, 58 Mich. 646; *East Saginaw & St. Clair R. R. Co. v. Benham*, 28 Id. 459.

Nor do we think there is anything in the point made that the act does not contemplate more than one union depot in each city or village. We find no warrant in the act for such contention. We think, also, that the question of the necessity was properly determined under the evidence by the jury, and we have no disposition to interfere with their award of damages.

It is clear to us that the jury were right upon both of these questions, and the proceedings will be affirmed, and the appeal dismissed, with costs of this Court.

The other Justices concurred.

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THE PEOPLE v. JAMES HARPER.

Criminal law—Homicide—Charge to jury.

1. A statement by the prosecuting attorney in his closing argument to the jury in a homicide case that the people were not bound by the testimony of a witness whose testimony they were bound to introduce, except in so far as it was believed to be true, is not open to objection.
2. The failure of the court in his charge in a homicide case to give a technical definition of the crime of manslaughter cannot be assigned as error, where upon the theory of the respondent he was guilty of that offense, and which theory the court plainly placed before the jury with instruction that, if found to be true, the respondent was guilty of manslaughter.
3. Where on the trial of a homicide case it was admitted that the respondent was guilty of manslaughter, but the theory of the defense was that he was innocent of the higher offense charged because of a want of criminal intent, a charge which gives to the respondent the presumption of innocence of such intent, and the benefit of any reasonable doubt the jury might entertain as to the intent with which he acted, is not open to the objection that the court did not instruct the jury that the presumption of innocence was with the respondent.

Error to Charlevoix. (Ramsdell, J.) Argued November 13, 1890. Decided November 21, 1890.

Respondent was convicted of murder, and sentenced to State prison for life. Conviction affirmed. The facts are stated in the opinion.

W. A. Norton, for respondent.

B. W. Huston, Attorney General, and *F. E. Fogg*, Prosecuting Attorney, for the people.

MORSE, J. The respondent was convicted of the crime

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of murder in the first degree, in the circuit court for the county of Charlevoix.

The evidence shows that the respondent and Turner (the deceased) were traveling about the country together, operating a gambling game called "Trivola." While at East Jordan, they became engaged with three others, Byers, Passage, and Stoneburner, in a game of poker, in the rooms of one James Shear. During the play the respondent charged Turner with cheating,—putting a hand up, or something of that kind,—and angry words passed between them. Harper left the room and went out upon the street. After a short time he went into a hardware store and purchased a revolver, loaded it, and went back to the room where the others were still playing cards. He was gone from the room in all about an hour. Soon after he entered the room, he pulled out the revolver, and, pointing it toward Turner, demanded that Turner count out to him upon the table the money he had lost in the game to Turner, as he claimed, by Turner's cheating. He said:

"You count my money out right on this table, and you haven't got but a minute to do it in."

Turner shoved back from the table, and had raised partially up, when the revolver was discharged in the hands of the respondent. There was some testimony that Turner, as he shoved back from the table, attempted to put his hand in his hip pocket.

The theory of the respondent, and his testimony, was that he did not intend to kill or shoot Turner, but to scare him into the payment back to him of the money claimed by him to have been won by Turner's cheating; that Byers, who was sitting near where respondent was standing, raised up out of his chair, and, in so doing, hit the revolver, or the arm of respondent, and the pistol

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was thereby accidentally discharged. This theory was partially corroborated by the testimony of Byers. In the closing argument of the prosecuting attorney to the jury, in referring to this testimony, he said that, although Byers was the people's witness, and the prosecution were obliged to put him on the stand, they were not bound by his statements, except in so far as they were believed to be true. This statement is assigned as error. We find, however, no cause for complaint as to this statement. Byers was one of the men in the room at the time of the shooting, and the prosecuting attorney was in duty bound, under our decisions, to swear him as a witness on behalf of the people in the case. The people could not be concluded by his statements, however. It was for the jury to ascertain and determine, from the testimony of all those present at the shooting, where the truth was, and whether the shot was fired by design or accident. It would have been proper for the court to have instructed the jury that the people were not bound by Byers' testimony; and, therefore, no harm was done the respondent by the statement of the prosecuting attorney to the same effect.

Before the court instructed the jury he said:

"Some requests have been handed to me to charge upon some branches of the case. These requests are in the handwriting of the attorneys, and, by lamp-light, they will be much better able to read to you than I. I therefore turn them over to them to read to you, and you will regard them as being charged by the court, and the law in the case the same as though they had been charged by myself. After you hear them, I shall charge you directly and generally upon the law of the case, and, in some respects, for the purpose of modifying some of the requests now granted at the request of the parties."

The requests referred to were then read by the attorneys, without objection. The court then proceeded with his general charge.

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It is claimed that, in saying—

"After you hear them, I shall charge you directly and generally upon the law of the case, and, in some respects, for the purpose of modifying some of the requests now granted at the request of the parties,"—

The circuit judge threw doubt and uncertainty over all of the requests to charge so read, causing the jury to put but little confidence in the defendant's requests so read, and to wait for the court's general charge before undertaking to form any opinion upon the law contained in the requests. It would have been better practice to have modified such requests as the court intended to vary or explain in immediate connection with each of such requests; but no objection to this method was made at the time, and defendant's attorney acquiesced in it. Furthermore, it must be presumed that the jury was composed of men of average intelligence; and we are satisfied from the reading of the whole charge, including the requests, that the jury were not misled thereby in the law of the case, nor the respondent prejudiced by this action of the court below.

It is also alleged that the circuit judge committed error in his abstract definition of the crime of manslaughter,—that it was neither complete nor correct. But, if this be admitted, the respondent was not harmed by it. The court specifically instructed the jury as follows:

"If you should find from the evidence in the case that the defendant had no intention, under any circumstances, of killing the deceased, but only intended to frighten him by the use of the revolver, in compelling him to deliver over that which he thought was his own, but, by some accident during the operation, the gun went off, and the deceased was accidentally killed in that manner, then the defendant is guilty of manslaughter, because the law will not permit a man to take a loaded weapon, and use it in that manner, even to get that which is his own."

This was the theory of the respondent. It was not

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claimed upon the trial that he was guiltless, but that he was only guilty of manslaughter, because he had no intent to shoot, but meant to freighten Turner, and the killing was caused by an accidental discharge of the weapon. The case being thus plainly put to the jury upon his own theory, with the instruction that, if such theory was found to be true, he was guilty of manslaughter, any defect in the technical definition of manslaughter could have had no weight against the respondent.

The general charge of the court is also attacked as objectionable in that it gives undue prominence to some of the testimony, to the prejudice of the respondent; and in speaking of the intent of the defendant, to the effect that, while the accused knew best as to his own intent in the shooting, still such intent must be found from the facts in the case, and, if his statements were found to be inconsistent with his conduct subsequent and prior to the killing, the jury should take his statements with such weight as they might appear to have under such inconsistent circumstances; and also in telling the jury that their verdict should be one that would satisfy their consciences that they had done justice to the people, and, under their oaths, what they were required to do,—

"That is, you have well and truly tried and true deliverance made between the people of this State and the prisoner at the bar. If you bring in such a verdict the people will be satisfied and you will be satisfied."

We think the charge not open to serious objection in any of these particulars. It is claimed that the latter clause was calculated to impress the jury with the idea that they must render a verdict to satisfy the people, and might also be regarded as an intimation against the accused. What the court meant, and what the jury would naturally understand, was that, if they arrived at their verdict upon their consciences and their oaths, they

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would do their whole duty in the premises, and that the people would be satisfied, whatever the outcome was. This was only a repetition of the doctrine well settled in this State, that, in a criminal prosecution, the people are not a party to the suit in the sense that the plaintiff is in a civil action, but that they stand unbiased between the law and the accused, seeking only justice fairly obtained.

The only remaining objection is that the court did not instruct the jury that the presumption of innocence was with the respondent.[1] The court, on request of respondent's counsel, charged the jury as follows:

"In considering the question of intent with which the defendant acted at the time Turner was shot, you will apply the same rule as in reference to other points in the case, with reference to allowing the defendant the presumption of innocence, and he is entitled to the benefit of any reasonable doubt you may entertain as to the intent with which the defendant acted. No criminal intent can be presumed, except such as can be fairly presumed from the evidence. As to the conduct of the defendant relating to the act charged as criminal, the purpose of permitting the defendant to testify in his own behalf is precisely this: To permit him to make his own defense, and as much with reference to the question of intent with which he acted as to other facts."

As it was not contended that respondent was innocent of any crime, but admitted that, from his own story, he was guilty of manslaughter, and as it is apparent from the record that whether or not he was guilty of a greater crime than manslaughter depended upon his intent, the presumption of innocence in favor of respondent, as applicable to this case, was fully and clearly enough stated.

It follows that the judgment of the lower court must be affirmed.

The other Justices concurred.

[1] Counsel for respondent cited *People v. Macard*, 73 Mich. 15.

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HIRAM V. RIFENBURG v. THE CITY OF MUSKEGON.

Condemnation proceedings—Notice.

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In this case a statute providing that the first publication of a notice of an application for the impaneling of a jury in condemnation proceedings should be made *at least* thirty days *before* the day of hearing is construed to require that thirty *full* days shall intervene between such publication and the day of hearing.

Certiorari to a justice of the peace of the city of Muskegon to review proceedings to condemn land for public use. Argued October 14, 1890. Proceedings quashed November 21, 1890. The facts are stated in the opinion.

F. W. Cook, for plaintiff in *certiorari*.

DeLong & O'Hara, for defendant in *certiorari*.

[The points and authorities of counsel are stated and cited in the opinion.—REPORTER.]

MORSE, J. Plaintiff is, and for many years has been, the owner in fee of lot 1, block 9, of the city of Muskegon, according to Newell's enlarged and corrected plat of that city. This lot is situated on the northwesterly corner of the block, and extends from Western avenue back to the center of the block, 125 feet. When the block was platted no provision was made for an alley running through the center either way. The plaintiff claims that for many years an alley has been opened through the block north and south. This claim is not admitted by the defendant.

Upon February 18, 1890, the common council of said city adopted a resolution declaring the running of an

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alley in an easterly and westerly direction through said block 9 a necessary public improvement, and in such resolution decided that it was necessary to take, for such purpose, "the southerly 16 feet off the southerly end of lot 1 [block 9], owned by H. V. Rifenburg." Proceedings were thereupon taken to condemn the above-described land for such public use. The same was condemned, and the plaintiff awarded $1,600 as damages. He brings such proceedings by writ of *certiorari* to this Court for review. There are three questions raised by the plaintiff's brief affecting the validity of this condemnation:

First, he insists that the notice of the time and place of making the application for the impaneling of the jury was not published for a sufficient length of time under the charter, which provides that notice shall be given "by publishing the same for three weeks in one of the newspapers of said city (if personal service on all the parties interested cannot be had), the *first publication* of which shall be *at least thirty days before the time fixed for the application.*" The first publication of the notice in this case was on February 22, 1890, and the day of the application hearing was fixed on March 24, 1890, at 10 o'clock A. M. Excluding the day of the hearing of the application, and there would be but 29 days of the publication, also excluding the first day of the same.

It is claimed by the defendant that the point is covered by the case of *Arnold v. Nye,* 23 Mich. 286, 293. The question arose, in this case, upon a statute relating to service of notice upon the adverse party of the time and place of an application for an order to take the deposition of a witness. This decision was followed and approved in *Eaton v. Peck,* 26 Mich. 57. In both of these cases, although the statute provided that such notice should be served "*at least ten days before* the making of such application," it was held that the day of

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the making of the application could be included in the 10 days. But in all cases in this State where the condemnation of land has been involved, it has uniformly been held that both the day upon which the notice is served and the day of the meeting are excluded. In proceedings for the establishment of highways there must be 10 full days between the day of notice and of meeting. *Platt v. Commissioner*, 38 Mich. 247; *Lane v. Commissioner*, 39 Id. 736; *Taylor v. Commissioner*, Id 739; *Powers' Appeal*, 29 Id. 504; *Coquard v. Boehmer*, 81 Id. 445; *Cox v. Commissioner*, 83 Id. 193. There should have been, in the case before us, 30 full days intervening between the first day of publication and the day of the application to impanel a jury. This lack of the requisite number of days renders the whole proceedings void for want of jurisdiction. It is not, therefore, necessary to notice the other objections.

The proceedings must be quashed, with costs to plaintiff.

The other Justices concurred.

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ANDREW ERICKSON v. THE MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY.

Negligence—Pleading—Cause of action.

The declaration in this case is held to state a cause of action, and is given in full in the opinion.

Error to Gogebic. (Daboll, J., presiding.) Argued October 17, 1890. Decided November 21, 1890.

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Negligence case. Plaintiff brings error. Judgment sustaining demurrer to declaration reversed, and a new trial ordered. The facts are stated in the opinion.

Hayden & Young, for appellant.

M. M. Riley and *J. E. Ball (Bradley G. Schley,* of counsel), for defendant.

LONG, J. This cause was commenced in the circuit court for Gogebic county by declaration, which was demurred to, and the demurrer was sustained by the court below, and judgment entered in the cause for defendant.

The declaration is as follows:

"STATE OF MICHIGAN.

"*In the Circuit Court for Gogebic County.*

"Andrew Erickson, plaintiff in this suit, by Hayden & Young, his attorneys, complains of the Milwaukee, Lake Shore & Western Railway Company, a railroad corporation in and existing under the laws of this State, defendant herein, of a plea of trespass on the case, filing this amended declaration, etc., as commencement of suit:

"For that whereas, heretofore, to wit, on the 7th day of November, 1889, and for a long time prior thereto, defendant was and had been operating a line of railroad, with side tracks, at Watersmeet, in said county, and at and during the time aforesaid, in the construction, repair, and improvement of its tracks and road-bed, used and operated a certain train called a 'gravel train,' operated with a locomotive, and hauled back and forth in the loading and unloading of gravel upon and from the cars of said train; that said train, at the time and place aforesaid, was under the charge of a person variously called a 'foreman,' or 'boss,' or 'conductor,' who hired and discharged all employés of defendant engaged to work thereon or thereabout as laborers, and who was charged by the employer, said defendant, with the performance of all duties owing by the employer to such laborers, not to expose them to risks outside their employment, or dangers which were extrahazardous, or perils the nature of which the servants should not understand or appreciate.

"That a short time—to wit, thirty days—prior to said November 7, the plaintiff, a common laborer, was engaged and employed by

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defendant, acting through said boss, to work for defendant under the direction and control, and subject to the orders, of said boss, as a common laborer, in the shoveling of sand and gravel upon and from the cars composing said gravel train; and that the plaintiff thereupon begun his said employment, and worked thereat for said defendant, in the capacity aforesaid, up to the said 7th day of November, 1889, and on that day up to the time of suffering the injury herein complained of.

"That, in such employment, said boss or foreman was the person highest in authority, and the only person in authority acting in behalf of said defendant in the control and management of said train, and in the direction and control of plaintiff, and was the only person on behalf of defendant to whom plaintiff could complain or look for information, instruction, or protection, and there was no person representing the defendant superior to said boss in respect to all matters aforesaid.

"That on, to wit, said 7th day of November, while plaintiff was standing upon one of the cars of said gravel train, as required in his employment, and in no danger, the plaintiff was, by the neglect and wrong of defendant, suddenly, without preparation, warning, or instruction therein or therewith, ordered by said defendant, acting through said boss, to pull a coupling-pin between two cars, and assist in separating the same, and to jump from one of said cars to the other, between which the uncoupling was done, and while one or both of said cars were in motion, and the distance between them rapidly increasing, and defendant, acting through said boss, at the same moment of time, and to further endanger the safety of plaintiff, and without plaintiff's knowledge, wrongfully and negligently and suddenly let off a brake on one of said cars, whereby the compliance by plaintiff with said order of defendant was made still more difficult and dangerous; that work of the character plaintiff was thus ordered to perform was entirely out of the line of plaintiff's duties in his said employment, and much more difficult and dangerous to perform than anything occurring in his said employment, and pertained to the duties of a brakeman; that plaintiff had no experience in such work, no ability to perform the same properly, or with reasonable safety to himself, no adequate knowledge or just conception of the dangers thereof, and no time to learn or to question the propriety of said order, all which defendant well knew at the time aforesaid, and the giving of which order to the plaintiff, and requiring him to perform the same at the time and in the manner aforesaid and the accompanying acts of defendant, through said boss, as aforesaid, was wrong and negligence of defendant towards the plaintiff.

"That under the order of defendant, as aforesaid, and fearing

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discharge if he refused, and without fault or negligence on his part, plaintiff attempted to perform the services so ordered by defendant, and while so attempting, and without fault on his part, fell between said cars, was run over, his right leg cut off, and his left leg and foot so bruised, wrenched, sprained, and broken that it became permanently disabled, and plaintiff deprived of the use of the same permanently, and he was rendered sick, sore, lame, and disordered, and suffered great pain, and so continued for a long space of time,—to wit, from thence hitherto,—and has been rendered incapable of labor and earning a living, whereby, through the wrong and carlessness of defendant, as aforesaid, and without neglect on his part, the plaintiff has been greatly injured and damaged, to wit, to his damage twenty-five thousand dollars ($25,000); and therefore he brings suit."

The demurrer charges that the declaration is insufficient for the following reasons:

"1. It fails to show or set forth the corporate existence of said defendant or its competency to be sued in said court.

"2. It discloses that the said plaintiff was guilty of negligence which contributed to the alleged injury complained of.

"3. It discloses that the risk assumed by plaintiff was an open and apparent one.

"4. It discloses that the plaintiff voluntarily assumed the risk complained of, as incident to his employment, and without remonstrance or protest on his part.

"5. It discloses that the risks complained of were the subject of common observation as well known to the plaintiff as to the defendant,

"6. It discloses that the alleged injury complained of was not caused by the negligence of said defendant.

"7. It discloses that the alleged injury complained of was caused solely by the negligence of said plaintiff and his fellow-servants.

"8. It wholly fails to disclose any legal liability upon the part of said defendant to the said plaintiff for the alleged injury complained of.

"9. The said declaration is argumentative, and charges the defendant with negligence only in, by, or through the inferences or conclusions drawn by the pleader from the facts therein stated, which said statement of facts wholly fails to disclose any such negligence on the part of said defendant."

The court below was in error in sustaining the demurrer and entering judgment for the defendant. The decla-

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ration, while not artistically drawn, sets forth a cause of action. If it is true that the plaintiff, while acting under the foreman or boss, was ordered by him to pull the coupling-pin and jump across to the other car, and, without any notice to the plaintiff, the foreman let off the brake, which suddenly accelerated the speed of the car and widened the distance which plaintiff was to jump, and the plaintiff had no knowledge or information that the brake was to be let off, and by that means the plaintiff was injured, without any fault or negligence on his part, he certainly would have the right to recover. These are questions for the jury.

We shall not pass upon the question raised in this record that the plaintiff and foreman were fellow-servants. The declaration states a cause of action, and the judgment of the court below must be reversed, and a new trial ordered.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. MORSE, J., did not sit.

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FRED H. POTTER v. THE SAGINAW UNION STREET RAILWAY.

Corporations—Exercise of franchise—Operation of street railroad by electricity—Equity—Injunction.

1. Whether a corporation is exercising a franchise or right within legislative authority is a question to be inquired into by the State.
2. A mere *apprehension* that injury *may* result to the property of a complainant by the substitution by a street railway company of electricity as a motive power will not warrant the court in

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perpetually enjoining such action on the part of the company.

3. It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all of the facts and circumstances, and grant or withhold relief as the justice or equity of the case may require; citing *Hall v. Rood*, 40 Mich. 46; *Buchanan v. Log Running Co.*, 48 Id. 364; *Big Rapids v. Comstock*, 65 Id. 78; *Blake v. Cornwell*, Id. 467; *Miller v. Cornwell*, 71 Id. 270.

4. In this case complainant sought perpetually to enjoin the use of electricity by defendant as a substitute for horse power in the operation of a street railroad in a street upon which complainant owned *vacant* land. And it is held that the granting of an injunction would cause the defendant far greater loss than complainant will suffer, if all of his apprehensions prove true; and that, if he has the rights he claims, he has a remedy at law for their violation, to which he should be remitted under the facts developed in this case.

Appeal from Saginaw. (Edget, J.) Argued October 22, 1890. Decided November 21, 1890.

Bill to enjoin the construction of appliances for the use of electricity in the operation of a street railroad in front of complainant's premises, and to enjoin the use of electricity for the operation of said road. Complainant appeals from a decree dismissing his bill. Decree affirmed. The facts are stated in the opinion.

Hanchett, Stark & Hanchett, for complainant, contended:

1. The following cases establish the proposition that the planting of defendant's posts, the placing and maintaining of its wires, and the sending over them of a current of electricity, constitute a franchise, if there is any right in the defendant to do such acts and maintain such a system, and that such a franchise can only exist by *express* grant from the Legislature: *Bank v. Niles*, 1 Doug. 403, 404; *Attorney General v. Bank*, Walk. Ch. 97; Ang. & Ames, Corp. § 111; *Perrine v. Canal Co.*, 9 How. 172; *Railway Co. v. Tramway Co.*, 30 Fed. Rep. 327, 328; *Eichels v. Railway Co.*, 5 Am. & Eng. R. R. Cas. 275; *Stanley v. Davenport*, 54 Iowa, 465-467, 475, 476; *Fanning v. Osborne*, 102 N. Y. 447; *Cogswell v. Railroad Co.*, 103 Id. 21-25; *People*

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v. Newton, 112 Id. 396, 400, 403, 404, 406–408; *Willis v. Telegraph Co.*, 37 Minn. 347; *State v. Mayor*, 49 N. J. Law, 344.

2. At the time of the passage of Act No. 35, Laws of 1867, under which the defendant is organized, the term "street railway" was understood to be equivalent to the term "horse railway," and this fact appears in the decision of all of the earlier cases on the subject of the right to construct and maintain street railways without consent of or compensation to the adjoining lot-owners; citing *Com. v. Temple*, 14 Gray, 69; *Railroad Co. v. Railroad Co.*, 12 Allen, 262; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Railroad Co. v. Railroad Co.*, 20 Id. 61; *State v. Laverack*, 34 N. J. Law, 201; *Elliott v. Railroad Co.*, 32 Conn. 579; *Railway Co. v. Cumminsville*, 14 Ohio St. 523; *Hobart v. Railroad Co.*, 27 Wis. 194; *Hiss v. Railway Co.*, 4 Am. & Eng. R. R. Cas. 201; *Teachout v. Railroad Co.*, 36 Id. 108; *Craig v. Railroad Co.*, 39 N. Y. 404. In all of these cases, which arose either under statutes earlier than 1867 or about that date, the question was of the right to construct and operate a street railroad without compensation to or the consent of the adjoining lot-owners, and in all but the one last cited the right is upheld because of the particular character of such a railway as *then* understood, and the motive power was animal.

3. The question here is distinctly whether, under the terms of the act of 1867, the power was conferred to use electricity as a motive power, and for that purpose to plant and maintain posts in the streets, construct and maintain a net-work of wires, and send through this net-work a current of electricity, which is confessedly a power requiring the greatest care to avoid injury to life and property. It is a question of the *intent* of the statute, upon which the following considerations have a bearing:

a—The fact that street railways were, at the time the act was passed, generally known as railways operated by horses, and were not known as railways operated in any other manner.

b—The term "street-railways," used in the prior statutes of 1863, applied to railways whose motive power was limited to horses or other animal power.

c—The statute itself shows the clearest evidence that animal power was contemplated to be used, in the provisions for the companies' acquiring and owning barns and stables.

d—The amendment of the act of 1855 was passed when this act in question was in force, conferring upon street railways organized under the act of 1855 the power to use steam or any other power, which amendment was uncalled for and without

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force if this act in question did not limit the railways organized under it to horse power.

e—If it had been intended by the statute to authorize the use of any power whatever, whether then known and used or not then known and used, some language should have been used to express definitely such intent.

f—The use of electricity and its appliances for operating railroads was then unknown.

4. In construing statutes granting franchises, the court will assume that the legislature intends to deal with that which is known, and not with the then unknown, and that it only intends to grant that of which it has knowledge; citing *Railway Co, v. Tramway Co.*, 30 Fed. Rep. 327, 330; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 146-148; *Teachout v. Railroad Co.*, 36 Am. & Eng. R. R. Cas. 114, 115; *Railway Co. v. Lake View*, 105 Ill. 211-214.

5. The only designation by the plat of the use to which Farley street is dedicated is by naming it a street, and this constitutes its dedication as a street. It expresses sufficiently the intent that it shall be used as a street, and the terms of the statute under which the plat was made limit its use to the uses of a street. The county holds the title to it in trust for the purposes of a street, and "for no other purpose whatever." The public, represented by the county, have only an easement, and the title is held in trust for the enjoyment of such easement. In behalf of the grantor, and lot-owners who are purchasers under him, equity will enforce the trust; citing *Detroit v. Railway Co.*, 76 Mich. 421; *People v. Beaubien*, 2 Doug. 270; *Riedinger v. Railroad Co.*, 62 Mich. 45; *Railroad Co. v. Hartley*, 67 Ill. 444; *Jacksonville v. Railway Co.*, Id. 540, 544; *Princeville v. Auten*, 77 Id. 325; *Warren v. Mayor*, 22 Iowa, 351; *Story v. Railroad Co.*, 90 N. Y. 157; *Lahr v. Railway Co.*, 104 Id. 291, 292; *Adams v. Railroad Co.*, 36 Am. & Eng. R. R. Cas. 12-15; *Wyman v. Mayor*, 11 Wend. 497, 498, 503; *Railroad Co. v. Nestor*, 10 Col. 403; *Railway Co. v. Cumminsville*, 14 Ohio St. 523.

6. The proposed use of the street by the defendant is not a *street* use within the intent of the grantor of the plat. There are many cases which hold that the construction and operation of a street railway, where the motive power used is *animal* power, is within the proper uses of a street; but those cases show that the facts concerning the particular road upon which the decision is based do not present a case in which the power used, or the appliances employed, were of a character which did in fact injure or endanger, or were likely to injure and

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endanger, the property of the adjoining lot-owner, but, on the contrary, such feature was absent from these cases; citing *Com. v. Temple*, 14 Gray, 69; *Railroad Co. v. Railroad Co.*, 12 Allen, 262; *Attorney General v. Railroad Co.*, 125 Mass. 515; *Elliott v. Railroad Co.*, 32 Conn. 579; *Railway Co. v. Cumminsville*, 14 Ohio St. 523; *Hobart v. Railroad Co.*, 27 Wis. 194; *Railway Co. v. Railway Co.*, 51 Cal. 583; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Railroad Co. v. Railroad Co.*, 20 Id. 61; *Hodges v. Railway Co.*, 10 Am. & Eng. R. R. Cas. 270; *Hiss v. Railway Co.*, 4 Id. 201; *Sears v. Railway Co.*, 20 Id. 36; *Randall v. Railroad Co.*, 17 Id. 184; *Railroad Co. v. Railroad Co.*, 22 Id. 160; *Teachout v. Railroad Co.*, 36 Id. 108; *Newell v. Railroad Co.*, 24 Id. 300, 304; *Stanley v. Davenport*, 54 Iowa, 475; *Briggs v. Railroad Co.*, 79 Me. 363; *Railroad Co. v. Nestor*, 10 Col. 403; *Mahady v. Railroad Co.*, 91 N. Y. 148.

7. The cases hold that in dedicating land as a street the grantor must have intended that improvements would be made in the street, and in the methods of its use; but there is no case which holds that any uses can be made of the street, or any methods of use can be adopted, which are subversive of any of the purposes for which the dedication was made, one of which purposes being to enhance the value of the adjoining lots by attaching to them the conveniences and privileges which arise from their bordering upon a public street; citing *Wyman v. Mayor*, 11 Wend. 497, 498, 503; *Story v. Railroad Co.*, 90 N. Y. 145, 146; *Railway Co. v. Cumminsville*, 14 Ohio St. 546, 547; *Crawford v. Delaware*, 7 Id. 469, 470; *Carli v. Railway Co.*, 28 Minn. 373; *Railroad Co. v. Reinhackle*, 15 Neb. 279.

8. It is the property right of the lot-owner that no method of the use of the street shall be adopted which endangers the use and enjoyment of his property within the boundaries of his lot, and he is entitled to protection against that which interferes with and injuries the proper use and enjoyment of his property; citing *Story v. Railroad Co.*, 90 N. Y. 145, 146; *Lahr v. Railway Co.*, 104 Id. 287-295; *Railroad Co. v. Nestor*, 10 Col. 403; *Railway Co. v. Cumminsville*, 14 Ohio St. 543-549; *Crawford v. Delaware*, 7 Id. 469, 470; *Stanley v. Davenport*, 54 Iowa, 475; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 79, 80; *Adams v. Railroad Co.*, 36 Am. & Eng. R. R. Cas. 13, 14; *Railroad Co. v. Reinhackle*, 15 Neb. 279; *Mollandin v. Railway Co.*, 14 Fed. Rep. 394; *Hobart v. Railroad Co.*, 27 Wis. 200.

D. P. Foote, of counsel, for complainant, contended:

1. The complainant is the owner in fee of the soil to the center of the street adjacent to his premises, and the planting of these

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poles on his land, and the operation of an electric railroad in the street, imposes a new and additional burden and servitude not contemplated in the act dedicating it as a place of passage, and not within the purposes for which a street is designated and may be lawfully used.

2. On October 16, 1838, the owners of this property placed on record a plat by which the street in question was dedicated to the public as and for a street, which plat was made under the territorial act of April 12, 1827 (2 Ter. Laws, 577). This act provided that the dedication should be deemed a conveyance, vesting the fee in the parcels intended for the public use in the county, "in trust to and for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever." The idea that the law had the effect to divest the dedicator of his freehold interest in the land, and to vest an *actual* fee in the county, has been repudiated by this Court; citing *Wayne Co. v. Miller*, 31 Mich. 447; *Bay Co. v. Bradley*, 39 Id. 163; *Griswold v. Bay City*, 35 Id. 452; *Detroit v. Railway Co.*, 76 Id. 421, 425.

3. Complainant's contention that the operation of an electric railroad in this street imposes a new and additional burden and servitude thereon, not contemplated in the act of dedication, and not within the purpose for which a street is designed, is sustained by *Railway Co. v. Cumminsville*, 14 Ohio St. 523; and before the defendant can come within the principle of *Macomber v. Nichols*, 34 Mich. 212, it must concede to all others the right to use the street as it does,—it must admit that no one has an exclusive right to use it in any particular way.

4. No fact was ever better established by legal evidence, or more generally known to all who observe what passes around them, than the fact alleged by complainant, that the use of electricity in the manner and for the purpose proposed by the defendant is attended with such hazards as most seriously to impair the value of his property abutting on the street where used, because, as in this case, it prevents him having the benefits and advantages a city street is intended to confer upon adjacent property that has been assessed and has paid for its construction:

a—It prevents free and unobstructed access to such property.

b—It prevents his having or even stopping a carriage in front of his premises.

c—It covers the street in front of his premises, and surrounds his (future) home with a net-work of destructive wires.

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d—It assumes the right to plant poles and make permanent erections on his property.

5. The owner of a city lot, fronting on a city street, without regard to his ownership of the fee, has a property interest in all the advantages a street is intended to give, and does give, lots fronting on it; citing *Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railway Co.*, 104 Id. 268; *Crawford v. Delaware*, 7 Ohio St. 469; Cooley, Const. Lim. 544; *Adams v. Railroad Co.*, 39 Minn. 286; *Railroad Co. v. Heisel*, 38 Mich. 71; and the New York elevated railroad cases sustain every proposition contended for by complainant.

Marston, Cowles & Jerome, of counsel, for complainant.

L. T. Durand (*O. F. Wisner*, of counsel), for defendant, contended:

1. As there is no present prospect of irreparable injury to complainant's vacant property, the relief sought is disproportionate to any injury he can possibly suffer, therefore it will not be granted; citing *Hall v. Rood*, 40 Mich. 46; *Macomber v. Nichols*, 34 Id. 212.

2. Before the complainant, as an adjacent lot-owner, can have equitable relief, the court must be satisfied:

a—That the injury feared is likely to be irreparable; citing *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 314; *Roake v. Telegraph Co.*, 41 Id. 35.

b—That the injury would be different in character, and not merely in degree, than that which the general public might sustain; citing High, Inj. § 816; *Rude v. St. Louis*, 93 Mo. 408; *Lorie v. Railway Co.*, 32 Fed. Rep. 270.

c—That the injury will probably, not *possibly*, happen; citing 1 High, Inj. §§ 762, 775; Wood, Nuis. § 867.

d—That the relief sought by the writ will not be disproportionate to the extent of the injury sustained or likely to be sustained; citing *Hall v. Rood*, 40 Mich. 46, 49.

3. The question of corporate power to adopt the system in question concerns only the common council, the defendant, and the State; citing Wood Ry. Law, § 192; 4 Am. & Eng. Enc. Law, 216, 217; *Railroad Co. v. Orton*, 32 Fed. Rep. 471; *Jones v. Habersham*, 107 U. S. 174; *Newell v. Railway Co.*, 35 Minn. 112; *Bridge Co v. Prange*, 35 Mich. 405; *Swartwout v. Railroad Co.*, 24 Id. 293.

4. The street railway act being silent as to the mode of propelling the cars, and the propulsion of cars being the business for which defendant was incorporated, such mode is left to the

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judgment and discretion of the corporation and municipality; citing Boone, Corp. §§ 40, 103; Wood, Ry. Law, § 169; *Railroad Co. v. Furnace Co.*, 37 Ohio St. 321; *Clark v. Farrington*, 11 Wis. 306.

5. The street railway act itself confers upon the municipality the power to legislate for the construction, use, and maintenance of a street railway upon its streets; citing How. Stat. § 3548; and section 21, tit. 3, of the charter of the city of Saginaw in force at the time gave it power to grant to street railway companies the right to lay their tracks in the streets of the city without first obtaining the right to do so from adjoining owners, either by purchase or legal proceeding; and by subd. 10, § 8, tit. 3, the power is given to determine and designate the routes and grade of any railroads to be laid in the city, and to restrain and regulate the use of locomotives, engines, and cars upon the same; while by sub. 36, § 8, tit. 3, the power is conferred to regulate the setting of awning, telegraph, telephone, electric light, and other posts and poles.

6. Whether the fee belongs to the adjacent property-owner, or to the county in trust, or to the city, this public street is under the jurisdiction and control of the city, to be devoted under municipal regulation, and without additional compensation to the adjoining owner, to those uses essentially of a public character for which it was dedicated or acquired, or which are consistent with the purposes of the original appropriation, "not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants;" citing Cooley, Const. Lim. 556; Dill. Mun. Corp. §§ 544, 573, 575, 576; *Henkel v. Detroit*, 49 Mich. 249; *Macomber v. Nichols*, 34 Id. 216; *Grand Rapids v. Hydraulic Co.*, 66 Id. 612; *Maybury v. Gas Light Co.*, 38 Id. 154; *Pierce v. Drew*, 136 Mass. 75–80; *McCartney v. Railroad Co.*, 112 Ill. 611; and it has been held that a change in motive power did not impose an additional servitude, and might be permitted where the railway itself was not changed from a street to an ordinary or commercial railway; citing Cooley, Const. Lim. 556; *Newell v. Railway Co.*, 35 Minn. 112; *Briggs v. Railroad Co.*, 79 Me. 363; *Williams v. Railway Co.*, 41 Fed. Rep. 556; *McCartney v. Railroad Co.*, 112 Ill. 611; *Moses v. Railroad Co.*, 21 Id. 516; *Mills v. Parlin*, 106 Id. 60; *Macomber v. Nichols*, 34 Mich. 219.

CHAMPLIN, C. J. This suit is brought to enjoin the construction of appliances for the use of electricity in operating a street railroad on the street in front of com-

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plainant's premises, and to enjoin the use of electricity for the operation of the road.

The bill avers that the complainant's premises front a distance of 240 feet upon Farley street in the city of Saginaw, and 100 feet upon Washington street. The City of Saginaw Street Railroad extends along Washington street, and is operated by horses. The defendant's street railroad has been built, and has been operated by horses, along Farley street, for about two years. Acting under an ordinance adopted by the common council of the city of Saginaw, it was engaged, at the time the suit was begun, in putting in place along the street a system of poles and wires constituting what is known as the "overhead system," intending to make use of such appliances in operating its roads by means of electricity. The system consists of poles planted on opposite sides of the street, at intervals of about 125 feet along the street. To such poles, at about 16 feet from the ground, are fastened naked, uninsulated metallic wires, extending across the street from pole to pole, called "cross" or "supporting" wires. Such cross-wires are intended to support and maintain in place, suspended therefrom, an uninsulated, naked copper wire, running longitudinally along the street over the track of the railroad, known as a "traverse" or "trolley wire," along which the current of electricity passes, and is conducted to the car by means of a follower attached to the top of the car, and which presses against the traverse or trolley wire, receiving therefrom the current of electricity, and, by means of conducting wires, carrying the electricity to the device in the car which gives propulsion to the car. The traverse wire has no shield, covering, or protection of any kind to prevent other things coming in contact with it, except a longitudinal wire placed at a short distance above it, called a "guard wire." The traverse wire is insulated

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only by means of insulators placed upon the short wires connecting the traverse wire with the cross-wires.

The complainant charges that the cars to be used are larger and heavier than ordinary horse-cars, and are intended to be run at a higher rate of speed; that the force applied to propelling each car will be equal to 15-horse-power; and that the cars, by their size, speed, appearance, and manner of propulsion, are calculated to frighten horses. The entire force of electricity intended to be used for propelling the defendant's many cars continually runs along such traverse wire. Farley street is a street 66 feet wide, paved 30 feet in width, and the defendant's road has a double track for turnout opposite complainant's premises, leaving only seven feet between the track and the curb of the pavement, and leaving scant room between the track and curbing for a horse and carriage to stand. There are many telephone and electric wires already placed along the street, with which the complainant will desire to connect when he shall occupy his premises as a residence. The premises are in a part of the city devoted to residences, and are chiefly valuable for residence purposes, and the complainant purchased the premises for and intends to use them for a residence to be erected thereon.

The complainant charges that if, by any means, the electrical current should pass from the traverse wire to the cross-wires, or if any of the telephone or electric light wires should, by any means, come in contact with the traverse wire, or if a stay wire should come in contact with the traverse wire, danger is incurred of injury to life and property in the immediate vicinity. The insulators used are liable to be broken or impaired, and the wires be displaced, in many ways,—as by storms, winds, cold, moisture, and by substances coming in contact therewith, by design or accident,—and the passing current of

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electricity be conducted to the ground by such cross-wires, poles, or other conductors which may chance to be at the place. There is danger that the iron rails of the track may become charged with electricity, and, when so charged, are dangerous to persons, horses, and animals coming in contact with them. By the dangers incurred by the employment of electricity by means of such appliances, the premises of the complainant are rendered less desirable for a residence and their value is seriously impaired; and this system for using electricity imposes an additional burden and servitude on the street inconsistent with its proper use as a street.

In July, 1889, the common councils of the city of East Saginaw and of Saginaw City, by ordinances duly enacted, gave the Saginaw Union Street Railway permission to substitute electricity as a motive power. Pursuant to these ordinances defendant at once began the work of putting in the system commonly known as the "overhead wire system." In the city of Saginaw, this work proceeded to the extent of establishing and placing its poles upon either side of the street, and in using those already set under an arrangement made with the owners thereof; the placing of the copper ground-wire and attaching it to the rails to provide for the return current back to the dynamos and connecting the poles with the transverse wires, from which to suspend the longitudinal or trolley wire, along which the current was to pass from the power station; and the defendant expended a large sum of money before the filing of the bill of complaint, and before any objection was made by anybody. In East Saginaw the work had been completed upon the Washington street and Genesee avenue lines, and the system was then in successful operation in those streets. Since then, the system has been extended over the defendant's lines of tracks, comprising about 20 miles in both cities, which

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cities have recently been consolidated, and are now known as "Saginaw City," and these lines are now being operated by electric power.

The complainant has four vacant lots situated at the south-east corner of Washington and Farley streets. Two of them front on Washington street, and two lie in the rear and front on Hamilton street. These are parallel streets, running north and south, and are intersected by Farley street, which runs east and west along-side of two of the lots owned by complainant. Along the side of these lots defendant's road, as originally built and operated, has a switch to enable cars to pass each other, and the track was so built that vehicles could pass between the rails and the curb-stone. It has not been changed since it was put down several years ago. Two electric light poles stand on the side of Farley street next to Potter's lots. To these defendant, with the permission of the owner of the poles, attached cross-wires running to the opposite side of the street and attached to poles there. These electric light poles are about 175 feet apart. No new or additional poles have been placed by defendant company along-side of complainant's lots. At the time the bill of complaint was filed the defendant had expended in this work, and in the establishment of its electric system elsewhere, upon its lines of track, over $70,000, and complainant had made no objection to the work done along his lots as stated. Complainant's lots are not inclosed by fences, but are open commons. The proofs taken in the case consist mainly of affidavits directed to the mode of construction and the danger in the use of electricity as a motive power for street railways. The relief asked for by Mr. Potter is that a perpetual injunction be issued restraining the operation of defendant's system by electric power.

Upon the argument, it was contended that this method

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of operating street railways burdened the highway with a servitude, and was not within the intention of the grantor when he platted the ground and dedicated the streets to the public use. Complainant's counsel also contend that the Legislature has not conferred either upon the city of Saginaw the power to make such a grant to the defendant, or to the defendant to use electricity as a motive power. It is proper that we should eliminate from the case that which is not involved in the issue—

1. The right of the lot-owner to be protected against the digging of holes and placing of poles upon the highway adjacent to his lot.
2. The right of the lot-owner to be protected against burdening the street with a new servitude, such as the laying down of rails and running of street-cars in front of his premises.

Neither of these is involved in the present issue, and, stripped of all outside questions, the issue is the right of the lot-owner to enjoin the use of electricity as a motive power for the propulsion of street-cars. In so far as the exercise of such right may rest upon the legislative grant, we observe that the company is exercising such right, and claims it under legislative authority; and, if the corporation is exercising a franchise or right without legislative authority, such exercise should be inquired into by the State. The complainant is not in a position to raise the question irrespective of an injury to his rights as owner of the property injured thereby.

As to the injury to the lots of complainant by use of electricity as a motive power, no present injury is shown. A mere apprehension that injury may result in the future is not enough to warrant the court in perpetually enjoining its use, if no injury can be said to exist which is of that character against which courts of equity should enjoin. Moreover, under the facts of this case, the injury is so remote, and the damages apprehended so dispropor-

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tionate to the loss which must be entailed upon defendant by a perpetual injunction, that it should not be granted. It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all the facts and circumstances, and grant or withhold relief as the justice or equity of the case may require. *Hall v. Rood,* 40 Mich. 46; *Buchanan v. Log Running Co.,* 48 Id. 364 (12 N. W. Rep. 490); *Big Rapids v. Comstock,* 65 Id. 78 (31 N. W. Rep. 811); *Blake v. Cornwell,* Id. 467 (32 N. W. Rep. 803); *Miller v. Cornwell,* 71 Id. 270 (38 N. W. Rep. 912). In this case the granting of an injunction would cause defendant a great many times more loss than complainant will suffer, if all his apprehensions prove true in the use of electricity to propel cars. Besides, if he has the rights claimed by him, he has a remedy at law for their violation, and he should, so far as the facts are now developed, be left to that remedy. For these reasons we do not consider that it is necessary to discuss or decide the points raised and elaborately argued by the counsel for the complainant in this case. He has not shown an infringement of an absolute right which calls for the interposition of a court of equity in his behalf.

The decree of the court below must be affirmed, with the costs of both courts.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

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SARAH C. BARBER v. THE SAGINAW UNION STREET RAILWAY.

Injunction—Appeal.

In this case the decree appealed from is held to have afforded complainant all of the relief she was entitled to, and is affirmed.

Appeal from Saginaw. (Edget, J.) Argued October 22, 1890. Decided November 21, 1890.

Bill to enjoin the construction of appliances for the use of electricity in the operation of a street railroad in front of complainant's premises, and to enjoin the use of electricity for the operation of said road. Complainant appeals from a decree enjoining the erection of poles in front of her premises without her consent, which decree is affirmed, with costs to defendant. The facts are stated in the opinion, and in *Potter v. Street Railway, ante,* 285.

Hanchett, Stark & Hanchett and *Marston, Cowles & Jerome* (*D. P. Foote,* of counsel), for complainant.

L. T. Durand (*O. F. Wisner,* of counsel), for defendant.

[See case of *Potter v. Street Railway, ante,* 285, for points and authorities of counsel.—REPORTER.]

CHAMPLIN, C. J. The facts in this case differ from those in *Potter v. Street Ry., ante,* 285 in this: The lot owned by Mrs. Barber is located at the north-easterly corner of Washington and Jefferson streets. The defendant's track is laid along Jefferson street, and, as it approaches Washington street from a westerly direction, it curves to the south, and proceeds along Washington street.

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The track is laid in the center of the street; and, assuming that complainant's rights extend to the center of the streets upon which she adjoins, the defendant's track nowhere comes within 10 feet of complainant's premises, if they extended to the center of the street. Defendant's trolley wire is over the center of the track, and curves with it. When the bill was filed, a sustaining wire extended from the trolley wire at the curve, and was attached to a pole standing between the sidewalk and the paved portion of the street in front of her lot. This pole was stayed with a wire running from the pole to a guy-post set in the ground in front of her lot. Defendant, in its answer, made an offer to remove each of them, and to maintain no poles upon or over her lot afterwards, without her consent. The court below, by reason of this offer, directed compliance with it, and the poles and wire were accordingly removed. It appears from the testimony of Dr. Barber, the complainant's husband, that since such removal the complainant has no cause for complaint.

Upon the hearing in the court below, the following decree was entered, viz.:

"It appearing to the court that, since the order was made in this cause for the issue of the preliminary writ of injunction, the post, pole, metallic rope, and wire described in the bill of complaint in said cause, erected by the defendant for operating its cars and street railroad by means of electricity, in front of the complainant's premises, described as 'lot 1, in block 28, north of Cass street, in the city of Saginaw,' in said bill of complaint, have been removed, as directed in said order: It is ordered, adjudged, and decreed that the said defendant be, and it is hereby, perpetually enjoined and restrained from at any time hereafter erecting, within the street limits on and in front of the complainant's said premises on Washington street, in said city, any poles, posts, or wires, for operating its cars or railroad by means of electricity, without the complainant's consent therefor first obtained.

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"It is further ordered, adjudged, and decreed that the complainant recover of the defendant her costs of this suit to be taxed as heretofore ordered; that the defendant pay such costs to the complainant; and that she have execution therefor out of and under the seal of said court."

This decree afforded the complainant all the relief she was entitled to, and the decree appealed from by her is affirmed, with the costs of this Court against the complainant.

MORSE, CAHILL, and GRANT, JJ., concurred. LONG, J., did not sit.

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BENJAMIN WOLF AND DAVID WOLF v. WILLIAM O'CONNER.[1]

Assignment for benefit of creditors—Execution—Bill in equity.

1. A deed executed prior to the passage of the statute regulating the making of assignments for the benefit of creditors, which purports to convey *all* of the grantor's property to the grantees in trust for the use and benefit of his creditors (with preferences) and which is signed and acknowledged by the grantor and grantees and placed upon record in the proper office, is *upon its face* a valid conveyance of all the grantor's property for the uses therein stated.
2. Joining in such a deed, and placing it upon record after the execution was completed, is conclusive of acceptance by the grantees; citing *Bank v. Mosser*, 57 Mich. 389.
3. In such a case a creditor obtained a judgment against the assignor after the making and acceptance of the assignment deed, and levied upon a portion of the assigned land, which was sold without filing a bill in aid of execution. As a *matter of fact* the assignees never acted under or attempted to exe-

[1] A rehearing was ordered in this case at the October term, 1890, and the case was reargued at the January term, 1891, but not decided.

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cute the trust, and some years after the execution sale they executed a quitclaim deed to the assignor of the land, who conveyed it by warranty deed. And in a suit in equity brought against the grantee in said warranty deed, in which the complainant claimed title to the land through the execution sale and attacked the assignment deed as fraudulent and void, it is held that the legal title passed to the assignees under the assignment deed, and was vested in them at the time of the execution sale, under which the purchaser acquired, at the most, only the interest of the assignor at the time of the levy, and that he could not sell the land in the face of such assignment deed, and purchase it on such sale, and then seek in equity to set aside the assignment deed as fraudulent as to creditors, or because of the failure of the assignees to execute the trust for the creditors generally.[1]

Appeal from Osceola. (Judkins, J.) Argued June 11, 1890. Decided July 2, 1890.

Bill to quiet title. Defendant appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

G. A. Wolf (*C. H. Rose,* of counsel), for complainants, contended:

1. The testimony was taken in open court, and the finding that the alleged assignment was never acted upon and never operative will not be disturbed on appeal; citing *Green v. Langdon*, 28 Mich. 221.
2. Defendant claims that acceptance of the trust is conclusively shown by the assignees' joining in the assignment, and cites *Bank v. Mosser*, 57 Mich. 386; but this case arose under our statute regulating common-law assignments, and there had been an acceptance of the trust *in fact* in that case, while in the case at bar the assignment was made before any statute existed on the subject, and it is an assignment with preferences, which was always looked upon with disfavor by the courts.
3. The rule at common law is that there must be an acceptance of the trust, which will be presumed, but which presumption is liable to be rebutted; citing Burr. Assts. § 265; Bump, Fraud. Conv. (3d ed.) 347; *Pierson v. Manning*, 2 Mich. 445, 462; *Ryerson v. Eldred*, 18 Id. 12; *Metcalf v. Van Brunt*, 37 Barb. 621.

[1] See *Edsell v. Nevins*, 80 Mich. 146; *Marshall v. Blass*, 82 Id. 518.

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4. The assignment prefers creditors according to a schedule referred to, and at the close states that the schedules of property and of creditors will be fully completed and attached as "*soon as the same can be done*," but the copy of the assignment offered in evidence shows no schedule of creditors, which will not be presumed to have been attached, for if so it would have been recorded under How. Stat. § 5676, which makes it the duty of the register of deeds to record the instrument at full length; and if the assignment substantially reserves the right to name the preferred creditors in the future, it is void; citing *Averill v. Loucks*, 6 Barb. 470; Bump, Fraud. Conv. 382.

5. The responsibility of the assignees is limited in the assignment, they being declared to be severally charged with their receipts, payments, acts, and willful defaults, etc., and not otherwise, while at common law the assignment is void unless the assignee is held responsible for the faithful performance of his duties to the full extent of the liability that the law imposes; citing Bump, Fraud. Conv. 422; Wait, Fraud. Conv. § 334; and the weight of authority is in favor of the proposition that such limitations render the assignment void on its face; citing *DeWolf v. Manfg. Co.*, 49 Conn. 282; *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

6. It is a sufficient answer to the claim that the bill should have been filed before the execution sale, that the law prior to 1867 did not require the filing of a bill; citing *Cleland v. Taylor*, 3 Mich. 201; *Trask v. Green*, 9 Id. 368; *Jenison v. Rankin*, 57 Id. 49, 52; but the purchaser could bring ejectment or file a bill; citing Bump, Fraud. Conv. 546; Wait, Fraud. Conv. § 126.

Russell C. Ostrander, for defendant, contended for the doctrine stated in the opinion as to the validity of the deed and the necessity for filing a bill in aid of execution.

LONG, J. The bill is filed in this cause to quiet the title to certain lands in Osceola county.

The bill avers that complainants are in possession, and have the original or government title, and also have certain tax titles, and that certain conveyances to the defendant, and claims made by him, cloud the title. On the hearing in the court below the tax titles asserted by each party were admitted to be void, and the only controversy here arises under the original title.

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All of the lands in question were patented by the United States to Dennis Robinson under two patents, dated, respectively, November 8 and December 15, 1855. October 5, 1857, Dennis Robinson made a deed of assignment conveying these and other lands, and all his property, real and personal, the lands being specifically described, to Nelson Robinson and George H. White, of Grand Rapids, and Robert R. Robinson, of Newaygo county, this State, in trust for the benefit of creditors. This assignment was signed and acknowledged by all the parties, and witnessed, and was recorded October 6, 1857.

On March 24, 1859, August Washman recovered a judgment against Dennis Robinson for $683.16 and costs in the circuit court for Newaygo county. March 23, 1859, Mr. Washman sold and assigned in writing this judgment and claim against Dennis Robinson to William S. Utley, who was then the clerk of that court. August 12, 1859, Utley issued an execution to the sheriff of Newaygo county to collect the Washman judgment. This execution was returned and filed November 1, 1859, by Utley. December 8, 1859, Utley issued another execution to the sheriff of Mecosta county, Osceola county forming a part of Mecosta county at that time. By virtue of this execution the sheriff of Mecosta county levied upon the lands in question and other lands. The execution on March 10, 1860, was returned satisfied in full by sale of these lands. Mr. Utley bought in the lands in question under this execution sale. August 28, 1871, Utley conveyed the lands to Delos A. Blodgett and James Kennedy, by deed of quitclaim, for a consideration of $500; and on June 3, 1874, Blodgett purchased Kennedy's interest therein, taking a quitclaim deed. September 1, 1883, the complainants, Benjamin and David Wolf, purchased the lands from Blodgett, taking a warranty deed; the consideration being named as $500.

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The defendant claims under the following chain of title:

1. The assignment from Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George H. White, dated October 5, 1857.
2. Deed of warranty from Dennis Robinson to defendant, dated December 23, 1887, consideration one dollar, conveying a one-half interest in these and other lands, subject to taxes and tax titles.
3. Deed of quitclaim from Robert R. Robinson and George H. White, trustees, etc., dated January 28, 1888, to Dennis Robinson, consideration therein of one dollar; Mr. Nelson Robinson, the other assignee, having died before that date.
4. Warranty deed from Dennis Robinson to defendant, conveying all the lands, dated March 4, 1889, for a consideration therein expressed of $50.

About the time of the filing of the bill in the present case, two other bills were filed against the defendant, one by Henry O. Bevier and the other by William F. Seely. These other two cases presented by these bills were heard in the court below at the same time with the present case, and the evidence, under stipulation of counsel, was to be treated as taken in all the cases. Decrees were entered in the court below granting the prayers of the bills, and declaring the trust-deed void, and a cloud upon the title of the several complainants; the other complainants having derived their titles also through the execution sale to Utley. The tax deeds held by defendant were also declared void. The decrees provided that the defendant should release to the several complainants his claims to said premises, and, in default, that the decrees stand in lieu of such conveyances, and be recorded for such purpose. From these decrees the defendant appealed, and all three cases are heard as one in this Court. The whole question hinges upon the validity of this trust-deed, as it appears that none of the complainants, except possibly

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Mr. Bevier, has been in actual possession and occupancy the time required by the statute to settle his title by adverse possession.

It is the claim of the complainants—

1. That the trust-deed was never accepted, and that the assignment was never acted upon by the parties, and was never operative.
2. That the instrument is void upon its face.

The testimony was taken in open court, and the court below found with the complainants upon these two propositions. These facts are controverted by the defendant. Defendant's contention is—

1. That the complainants cannot assert in a court of equity the title procured through the execution sale.
2. That the trust-deed conveyed the estate and title to the trustees, and it was so vested in the trustees at the time of the levy and sale under the execution.
3. That, the title being reconveyed to Dennis Robinson by the trustees, the defendant procured an absolute title to the premises under his deeds.

The complainants fail to point out the reason for their assertion that the deed of assignment is void on its face. It purported to convey the whole of the property of the assignor for the use and benefit of his creditors. It was executed prior to our statute regulating the manner of making and executing assignments for the benefit of creditors. It was signed and acknowledged by the assignor, as well as the assignees, and placed upon record in the office of the register of deeds of the county of Newaygo, where the assignor and one of the assignees resided. Upon its face, it was not void, but a valid conveyance of all the property of Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George A. White for the benefit of the creditors of the assignor. At the time of its execution, it appears that Washman, under and through

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whose judgment the complainants now claim to hold the property, was a creditor of Dennis Robinson, and, after the execution of the trust-deed, those claiming under his judgment called upon the assignees for payment of the claim. Neither Washman, Utley, nor any other of the creditors, appear to have moved to set the deed of conveyance aside, but, after the lapse of two years and more from the time the deed was recorded, and while the title of record stood in the trustees, levied upon and sold the land under an execution directed against the assignor.

There is an abundance of evidence contained in the record showing that the assignees never acted, or attempted to execute the trust. It appears that, after the deed of assignment was recorded, the assignor continued to control the personal property assigned, of which there was about $2,000, consisting of horses, wagons, harnesses, and lumbering outfits, etc.; that it was disposed of by some one, or spirited away, and no creditor was ever paid a dollar, so far as here shown. It also appears that the assignor afterwards gave deeds of conveyance of a portion of the lands described in the deed of assignment, and did other acts showing that he still claimed an interest in and control over the property. It also appears that certain of the creditors called upon the assignees, or some of them, and demanded payment of their claims, and that they denied any interest in the property, and stated expressly that they never had anything to do with it, and should not, so far as the execution of the trust was concerned.

The legal title to these lands, however, conveyed by the trust-deed, remained in the assignees, and the survivors of them, until the execution of the deed of quitclaim of January 28, 1888, by White and Robert R. Robinson, the surviving assignees, to Dennis Robinson; so that, at the time of the levy and sale of the lands under the Utley

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execution, the legal title stood in the assignees, and not in Dennis Robinson. Washman and Utley had notice by the record of this deed that the legal title had gone out of Dennis Robinson, and the testimony shows that they had actual notice of that fact; yet they levied upon and sold the land as the property of Dennis Robinson, without any proceeding for the enforcement of the trust, or to set it aside as fraudulent. Utley then stood in the position of a purchaser under execution sale of whatever interest Dennis Robinson had in the premises at the time of the levy. As we have seen, he at that time did not have the legal title; and, whatever the attitude of Dennis Robinson or of the assignees towards the property may have been thereafter, or the refual of the assignees to act under and carry out the terms of the trust, would not operate to reconvey the title to the realty to Dennis Robinson. The creditors have the right to its enforcement, as the assignees had accepted the trust in writing, acknowledged its execution, and placed the same of record.

It was held in *Commercial Nat'l Bank v. Mosser*, 57 Mich. 389 (24 N. W. Rep. 116), that the assignees joining in the assignment, and putting it upon record after the execution was completed, is conclusive of acceptance. This principle is conceded by counsel for complainants, but it is claimed that the facts above set forth show more conclusively that they never did accept the trust, and never acted under it.

The acceptance, however, was in writing, duly acknowledged and recorded; and Washman and Utley not only had constructive, but actual, notice of the transfer of the legal title. The complainants here stand in no better position than Washman and Utley. Whatever rights Utley acquired under the execution sale, these complainants have,—no less and no more,—except such as might

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be given by continued occupancy. If Dennis Robinson had equitable interests in the premises which might have been reached at that time by Washman or Utley as creditors, no proceedings were instituted for that purpose; but they proceeded at that time, and are now proceeding, upon the theory that the legal title was in Dennis Robinson at the time of the execution levy and sale. In this the complainants are in error. The legal title at that time was in the assignees. If Utley had any remedy at the time of the levy, it was by bill in aid of his execution. He could not go on with the sale in the face of this deed, purchase in under the execution sale, and then come into court and ask to have the deed set aside as fraudulent as to creditors, or for the reason that the assignees were not proceeding to execute the trust for the creditors generally. *Cranson v. Smith*, 47 Mich. 189 (10 N. W. Rep. 194); *Messmore v. Huggard*, 46 Id. 558 (9 N. W. Rep. 853). The other creditors had rights and interests in the premises which were to be protected under the assignment, and at that time could have insisted upon the performance of the trust by the assignees. But, however this may be, no legal title was acquired to the premises by the sale under the execution to Utley; and the complainants have, under the proofs contained in this record, no standing in court to insist upon the right to have these deeds set aside. In so far as the complainant Bevier is concerned, it may be added that the proofs do not show any such continued occupancy as would entitle him to the relief sought.

We do not desire, however, to be understood as holding the title of the defendant as one of an estate absolute in fee in him. He purchased for a nominal consideration, and with actual notice of the rights of the creditors of Dennis Robinson in all these lands. He must, therefore,

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be treated as holding for their use and benefit; they having the right to the enforcement of the trust.

The decree of the court below must be set aside, and decree entered here dismissing the bills of complaint, with costs of both courts to defendant.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. CAHILL, J., did not sit.

WILLIAM F. SEELY v. WILLIAM O'CONNER, AND HENRY O. BEVIER v. WILLIAM O'CONNER.[1]

[Two cases.]

Creditors' bill.

These cases are ruled by *Wolf v. O'Conner*, *ante*, 301.

Appeals from Osceola. (Judkins, J.) Argued June 11, 1890. Decided July 2, 1890.

Bills to quiet title. Defendants appeal. Decrees reversed, and bills dismissed. The facts are stated in *Wolf v. O'Conner*, *ante*, 301.

G. A. Wolf, for complainants.

Russell C. Ostrander, for defendants.

LONG, J. These cases are ruled by the opinion in *Wolf v. O'Conner*, *ante*, 301, filed at the present term of this Court.

[1] Rehearings were ordered in these cases at the October term, 1890, and the cases were reargued at the January term, 1891, but not decided.

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The decrees of the court below must be dismissed, and decrees entered here dismissing complainants' bills, with costs of both courts.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. CAHILL J., did not sit.

LILLIE E. SPAULDING v. LYMAN W. BLISS AND EUGENE W. DAVIS.

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Malpractice—Evidence—Charge to jury.

1. The plaintiff in a malpractice case was asked to state whether or not the pain in her knee and the difficulty that she had experienced from it, including the swelling, was, as far as she could tell by any feeling, connected with the point of injury where her leg was broken; the answer to which question is held to have been properly excluded, the witness not being an expert, and therefore not competent to testify as to what was the *cause* of such pain.
2. Where in a malpractice case the declaration alleges that in setting plaintiff's broken leg the defendant was guilty of negligence, and that he negligently and carelessly injured the ligaments of the knee, resulting in permanent lameness and deformity, a charge which treats the question at issue as one of neglect in the care of the broken limb, rather than as one of an injury to the knee, caused by such alleged negligence on the part of the defendant, is erroneous.
3. The court instructed the jury in a malpractice case that they were necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons, when they came to determine whether, on the facts in the case, the defendant had treated the case in a proper form, and by the use of proper appliances, and in the same connection stated that no other witnesses than such physicians and surgeons had undertaken to testify on that subject; which instruction is held unobjectionable, it being the province of the other witnesses to give the facts as to the treatment and acts of the defendant, and

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for the physicians and surgeons to say whether or not the same were proper.

Error to Saginaw. (Edget, J.) Argued October 22, 1890. Decided November 21, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Tarsney & Weadock, for appellant, contended:

1. In support of the first assignment of error, counsel cited: Wood, Prac. Ev. § 147, p. 420; *Hyatt v. Adams*, 16 Mich. 199; *Johnson v. McKee*, 27 Id. 471; *Maclean v. Scripps*, 52 Id. 240.
2. As a jury cannot be instructed what weight to give to evidence, neither can they be instructed that they are bound to adopt the testimony of physicians and surgeons, or any class of witnesses; citing *Davis v. Gerber*, 69 Mich. 253; *Sheahan v. Barry*, 27 Id. 266; *Blackwood v. Brown*, 32 Id. 104; *Hall v. People*, 39 Id. 717, and cases cited.

L. T. Durand (*Hanchett, Stark & Hanchett*, of counsel, for defendants, contended:

1. The authorities cited in support of the first assignment of error do not support the right to ask the question the answer to which was excluded, but are in harmony with *Mayo v. Wright*, 63 Mich. 32, and are to the effect that the injured person may *describe* his symptoms and sufferings.
2. Where the fact is admitted or undisputed, and there is no conflict of evidence, the question is one of law, upon which direct instruction ought to be given; citing *Wisner v. Davenport*, 5 Mich. 504; and when there is a total want of evidence upon any essential point, the jury should be so charged distinctly; citing *Scripps v. Reilly*, 38 Mich. 22; and a party is entitled to specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury from the evidence might legitimately find, and which have not been covered by other instructions; citing *Sword v. Keith*, 31 Mich. 255.
3. The jury were bound to adopt the testimony of the physicians and surgeons as to whether the method adopted and appliances used were proper, because no other witnesses were competent to give evidence on those subjects, and the jury have no right to decide such questions upon their own judgment; citing *Mayo*

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v. Wright, 63 Mich. 40; *Wood v. Barker*, 49 Id. 298; *People v. Hall*, 48 Id. 490; *Evans v. People*, 12 Id. 38.

4. The presumption is that the defendants did their duty, and the plaintiff is bound to show affirmatively the contrary; citing *Hitchcock v. Burgett*, 38 Mich. 512; *Patten v. Wiggin*, 51 Me. 596–598.

MORSE, J. This is an action brought against the defendants, who are physicians, and were copartners in business at the time of the alleged malpractice, for which damages are claimed in this suit.

The plaintiff, who is a married woman, about 50 years of age, and by occupation a milliner and hair-dresser, met with an accident, by which her right leg was broken above the knee, the break being an oblique fracture about the lower third of the thigh-bone or *femur*. This injury happened on July 27, 1887, about 11 o'clock A. M. She was at her son's, outside of the city of Saginaw, and it was some hours before the broken leg was set. Dr. Bliss was sent for, but he was unable to be present, and Dr. Davis, with the assistance of Mr. Moore, a druggist, reduced the fracture. Dr. Davis soon afterwards went to the State militia encampment, at Brighton, and Dr. Bliss was himself hurt, so that he could not attend upon plaintiff. He sent Dr. Morse, who managed the case until Dr. Davis returned, about August 13, 1887. After that Dr. Davis had full charge of the plaintiff's case.

The declaration contains seven counts. The first alleges that defendants should have used splints and other appliances to hold the fractured and broken bones together in permanent position, and to aid in securing a cure of the plaintiff's injury, which she alleges they did not do in proper time.

The second count charges negligence on the part of the defendants in not putting on suitable plaster casts at

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the proper time; she alleging that they wholly neglected their duty in that regard.

The third count alleges that the defendants did not use ordinary skill and care to secure the fractured bones of plaintiff's leg, and did not furnish counter-extension as soon as practicable after the bones had been set; and that they put on weights of too great weight, and furnished no counter-extension.

The fourth count charges that Dr. Morse put the splints on plaintiff's leg wrong, thereby causing her great pain.

The fifth count alleges a breach of duty on the part of the defendants in not ascertaining the full extent of the injury to the plaintiff's leg, and giving it proper and suitable treatment, alleging that her knee was injured in the fall, and that the defendants did not ascertain that fact, or do anything for her knee.

The sixth count alleges that defendants should have so cared for the knee as not to have injured it at the time of setting; but on the contrary plaintiff alleges that Mr. Davis and one L. G. Moore, a druggist, who accompanied him, used such force and violence, at the time of setting the leg, as to wrench and dislocate, and otherwise injure, the knee on the fractured leg.

The seventh count alleges that the defendants did not attach the proper attachments and appliances in the proper manner to the injured leg of the plaintiff.

To this declaration the defendants pleaded the general issue, and the case came on for trial at the July term, 1889, and resulted in a verdict for the defendants.

There are five assignments of error. *First.* The plaintiff was asked the following question, which was objected to as incompetent:

"*Q.* State whether or not the pain in your knee and the difficulty that you have experienced from it, including

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the swelling, was, so far as you could tell by any feeling, connected with the point of injury where your leg was broken.

"*The Court:* I think it is only competent for her to describe the symptoms; I think that is not a proper question.

"*Mr. Weadock:* Now describe the feeling of your limb between the point of injury in the knee and the point of injury at the fracture above the knee, as to whether or not there was any pain.

"*A.* Always pain in the knee,—always.

"*Q.* But was there a pain above the knee before you arrived at the point of fracture?

"*A.* Not so much as in the knee. I never suffered any pain in the fracture to amount to anything while I lay on my back, but in was all in my knee."

Plaintiff's counsel claimed on the trial that her knee was injured by the action of the physician and his assistant in setting the broken limb; that by the use of unnecessary force they wrenched the knee, and injured it by breaking or partially rupturing a ligament or ligaments. It is contended that the question ruled out, in view of this claim, was competent. We think she was permitted to testify as fully as the law allows to her symptoms and feelings. It was not her province to state conclusions. She could tell where her pains were, but she was not an expert, and could not, therefore, testify what was the cause of such pains. When she testified that she never suffered any pain of any amount in the fracture, but it was all in the knee, she was permitted to give her symptoms and her feeling as to where the pain was located, and from whence she felt it proceed. It was not competent for her to say whether or not it was connected with, or caused by, the fracture.

The other assignments relate to the charge of the court. It is insisted that the following instructions were erroneous:

"1. There is no evidence in the case that the setting

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of the fracture of the thigh was a bad job, or a bad piece of work on the part of the defendants.

"2. The defendants have not neglected the performance of any duty which they were called upon to discharge with reference to this plaintiff.

"3. So, you are necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons, when you come to determine whether, on the facts in this case, these defendants have treated the case in a proper form, and by the use of proper appliances.

"'4. There is no evidence that the broken bones of the thigh were not set in place just as they should be set when they healed.' I give that. I don't now recollect any evidence which conflicts with that statement."

The first and fourth can be considered together. Plaintiff's counsel claim that these instructions were misleading; and that the jury might understand, and probably did, that this reference to the job or work of setting the limb referred to the whole job and work of the defendants upon the case,—that the work of joining the bones in the leg, the putting on of splints, putting on of a plaster cast, the machinery for the extension and counter-extension of the leg and keeping the bones in place, the dressing of the limb, and all the other necessary things to be done about the work of the recovery of the patient and the proper healing of the limb, were all one job or piece of work; and that, therefore, these instructions were equivalent to a statement to the jury that they must find for the defendants.

The charge must be taken as a whole, and a reference to it shows very plainly that this was not the intention of the court, and that the jury could not have been misled to the extent claimed by these two clauses of the general charge. It will be remembered that the sixth count of the plaintiff's declaration alleges that due care was not exercised as to the knee at the time the leg was set, and that Dr. Davis, and Mr. Moore, the druggist,

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used such force and violence, at the time of setting the leg, as to wrench and dislocate, and otherwise injure, the knee on the fractured leg. The other counts allege various acts of negligence in the care of the leg after the setting of the bones. The allegations in these other courts were submitted to the jury, and we think the jury must have clearly understood that they were not precluded from finding a verdict for the plaintiff upon any of these matters of neglect, if they found any such neglect.

But the jury might have been misled by this charge as to the allegations contained in the sixth count. If, as claimed by the plaintiff, in the reducing of the fracture and the setting of the bones of the broken thigh unnecessary force was used, and the ligaments of the knee broken or injured, the setting of the fracture was a "bad job." This count alleges that the defendants employed improper assistants to aid in reducing the fracture, and did not give them proper instructions,—

"But, on the contrary, knowingly selected unsuitable and unskillful persons to aid and assist them in the setting of said leg and the reducing of said fracture, to wit, one Lewis G. Moore, of the city of Saginaw; that said Lewis G. Moore was wholly incompetent, unskillful, and an improper person to aid and assist in the reducing of said fracture and the setting of said leg; that the said Lewis G. Moore wrongfully, negligently, and carelessly, and with great force and violence, pulled, turned, twisted, and wrenched the said fractured leg of said plaintiff more than was necessary to set the same, and thereby dislocated, broke, sprained, twisted, wrenched, and put out of place and injured the bones, joints, ligaments, muscles, arteries, cords, nerves, and flesh of said plaintiff's said kee, and of her right leg; that, by reason thereof, the said right leg of said plaintiff, including the said plaintiff's right knee, from thence hitherto has been and now is stiff, sore, swollen, deformed, and lame," etc.

Nowhere, in the charge of the court, do I find any

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instruction which authorizes the jury to find that in the setting of the bones of the leg the defendants negligently and carelessly injured the ligaments of the knee. In speaking of the knee, of which the plaintiff chiefly and specially complained, the court treated the question at issue as one of neglect in the care of the broken limb, rather than as one of an injury to the knee, caused by the negligence of the defendants in setting the limb. This being the case, in other portions of his charge, when he instructed the jury that there was no evidence in the case that the setting of the fracture was a "bad job," the jury were misled, and the instruction was erroneous, if there was in the case any testimony tending to show that the defendants were negligent and unskillful in handling the limb at the time of reducing the fracture, by means of which the knee was injured. We think there was such testimony.

As to the third objection to the charge of the court, it is not tenable. The court said, in connection with it, that—

"No other person, no other witness in this case, aside from the surgeons—the physicians—who have testified in the case, have undertaken to tell you what is proper practice, or what, under the present methods of surgery, would be proper practice in this given case."

It was for the others to give the facts as to the treatment and acts of the defendants, and it was for physicians and surgeons to say whether or not the same were proper.

The second objection culls language out of the charge which if standing alone would be error, but as it was given it was proper, to wit:

"And if you find, from the evidence in the case, that these several physicians, who attended upon the plaintiff, did exercise that ordinary degree of care and skill which I have defined, then the plaintiff is not entitled to recover;

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the defendants have not neglected the performance of any duty which they were called upon to discharge with reference to this plaintiff."

For the error above noted, the judgment below must be reversed, and a new trial granted, with costs of this Court to plaintiff.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

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FREDERICK MENZER v. MARGARETTA MENZER.

Divorce—Extreme cruelty.

A husband deeded to his wife his homestead, worth from four to five thousand dollars, and gave her all of the household furniture, which constituted the bulk of his property. For some time after his wife refused to cohabit with him, he was allowed the privilege of a room in this house, but was finally driven from it, and his wife moved to another city, and rented the homestead to strangers, which action on the part of the wife is held to be extreme cruelty.

Appeal from Genesee. (Newton, J.) Submitted on briefs October 23, 1890. Decided November 21, 1890.

Bill for divorce. Complainant appeals from decree dismissing bill. Reversed, and decree entered granting divorce on the ground of extreme cruelty. The facts are stated in the opinion.

Frank B. Leland, for complainant.

Howard & Gold, for defendant.

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MORSE, J. The bill of complaint in this cause was filed November 24, 1888, praying for a divorce on the grounds of extreme cruelty and desertion. Defendant answered denying the acts of cruelty and desertion charged, and alleging that the cause of their domestic unhappiness was the fault of complainant.

The parties were married in January, 1866, in California. Since 1870, the complainant has resided in Flint, Genesee county, Mich. His wife lived with him until April, 1887, but now resides in Detroit. The children of the marriage live with her. There are four of them, two sons and two daughters. At the time of the filing of the bill, they were aged, respectively, 22, 20, 14, and 10 years.

The testimony of the complainant makes a sufficient case of extreme cruelty on the part of his wife. Most of the acts charged, however, stand alone upon his evidence, without corroboration from any one. The children support the mother in her denial of cruelty to the father. To the same effect is the testimony of a domestic, a woman who lived in the family for ten or twelve years, and up to within two or three years of the separation of the parties. The circuit judge, before whom the testimony was taken in open court, refused the complainant a decree, and dismissed his bill.

One of the main charges of cruelty in the bill, we think, is sustained by the evidence. The complainant is shown to be a hard-working, industrious man, and more than generous in his expenditures for his family. His wife was inclined to be extravagant, but her wants and wishes were always gratified in the way of household expenses. The testimony of every disinterested witness shows that, ordinarily, the complainant was the most indulgent of husbands and fathers, and more so than his

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means warranted. One of his sons testifies: "My father seemed to do everything he could for his family." There were quarrels between husband and wife, in which neither was blameless, but he has been more sinned against than sinning.

He erected a comfortable and substantial home upon two lots in the city of Flint, which is worth four or five thousand dollars. This he caused to be deeded to the defendant. He also gave her all the furniture therein, except his own personal belongings. This was the bulk of his property. For some time after his wife refused to cohabit with him, he was allowed the privilege of a room in this house, but finally he was driven from it. His wife moved to Detroit, and rented the homestead to strangers. It is evident also that he was not well treated for some time before he was compelled to leave the house. We think this action of the wife can be considered extreme cruelty.

One of his daughters also sent a communication to a disreputable paper at Saginaw, which was published, in relation to her father, showing a malicious spite and feeling not commendable in any child, much less in one who had been so generously and kindly treated as she had been by her father. The mother aided and abetted the daughter in this transaction. It is evident that the wife has lost all affection for her husband, and does not desire to live with him any longer. But she is determined that he shall not have a divorce, and is actuated in this determination by something more than the fact that she is a Catholic, and does not believe in divorces, which she claims is the reason of her opposition.

The decree of the court below, dismissing complainant's bill, is reversed. He will be granted a decree of absolute divorce here for extreme cruelty. No costs will be allowed

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either party. As the wife has nearly all the property, no alimony will be granted her.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

WARNER D. SHAW v. SARAH L. HILL.

[See 79 Mich. 86.]

Ejectment—Parties—Equitable title—Judgment.

1. An employé of a defendant in ejectment, who was permitted to move into the house on the premises, and lived therein when the suit was commenced, but who claimed no rights in the land as tenant or otherwise, is not a necessary party defendant.
2. The right of *possession* of a plaintiff in ejectment under color or claim of title may be *prima facie* title as against a mere intruder, but when a defendant shows an equitable interest in the land, unconnected with and independent of plaintiff's claim of title, he may show in defense plaintiff's want of title.
3. In the cases in which it has been held that an equitable title cannot be set up in ejectment against the legal title, the legal title was fully established, and the evidence of the equitable title was sought to be introduced to overthrow the legal title, which, without such evidence, was admitted; citing *Whiting v. Butler*, 29 Mich. 122; *Ryder v. Flanders*, 30 Id. 336; *Conrad v. Long*, 33 Id. 78; *Harrett v. Kinney*, 44 Id. 457; *Yale v. Stevenson*, 58 Id. 537; *Geiges v. Greiner*, 68 Id. 153.

Error to Berrien. (O'Hara, J.) Argued October 29 and 30, 1890. Decided November 21, 1890.

Ejectment. Defendant brings error. Reversed. The

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facts are stated in the opinion, and in former report of the case.

Jacob J. Van Riper and *George S. Clapp*, for appellant.

O. W. Coolidge, for plaintiff, contended:

1. The defendant has shown no title in herself:
   a—The deed of Lanman to Fleetwood was inadmissible, because the certificate of acknowledgment, purporting to be made by a commissioner of deeds for Michigan, had no seal, nor any word, recital, or device tending to show any seal; citing *Buell v. Irwin*, 24 Mich. 145; *Pope v. Cutler*, 34 Id. 150; and the record of a deed defectively executed is not made evidence of a valid sale without the production of the deed; citing How. Stat. §§ 5724, 5727; *Brown v. Cady*, 11 Mich. 535.
   b—The deed of Fleetwood to Butler was inadmissible, because not certified by the clerk of a court of record to have been executed according to the laws of the state where executed, as required by Rev. Stat. 1846, p. 263, § 10, which statute was in force when the deed was executed; nor is there any evidence that the deed was executed according to the laws of the state of New York; citing *Brown v. Cady*, 11 Mich. 535; nor does the certificate of acknowledgment, which is signed, "J. M. Baldwin, Commissioner of Deeds," show for what state, if for any, he is commissioner.
2. There was no tenant on the premises when suit was commenced, and if any one occupied the house he was simply a hired man of defendant, and not a necessary party defendant; citing *Hendricks v. Rasson*, 49 Mich. 85; *Shaver v. M'Graw*, 12 Wend. 558; *Chiniquy v. Bishop*, 41 Ill. 157.

Edward Bacon, for plaintiff.

MORSE, J. This case has been here once before, and will be found reported in 79 Mich. 86. The facts are not materially different from what they were then, except in the showing made by defendant as to her title to the premises.

There was also on the last trial some evidence tending to show that one Curran was in the actual occupancy of the premises at the time this suit was brought, and it is claimed by the defendant that he should have been made

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a defendant. It was shown, however, that the occupancy of Curran was for but a short time, and while he was working for defendant; that he made no claim to any rights in the land, either as tenant or otherwise. It seems he wanted to move into the house on the premises, and the defendant permitted him to do so. Under the circumstances, it was not necessary to make him a party.

We held in the case when it was here before that plaintiff, although he was shown to have no title in the land, but entering into possession in good faith, under a claim of right—his tax title deeds—which proved valueless, could nevertheless maintain ejectment against the defendant, who obtained possession through plaintiff's tenant, Streeter, and who showed no title, right, or interest in the land, except a claim, merely asserted, but not proved, of being the original owner of the land; citing *Bertram v. Cook*, 32 Mich. 521; *Cook v. Bertram*, 37 Id. 125; *Bertram v. Cook*, 44 Id. 397 (6 N. W. Rep. 868); *Morse v. Byam*, 55 Id. 594 (22 N. W. Rep. 54); *Fuller v. Sweet*, 30 Id. 241. See *Shaw v. Hill*, 79 Mich. 90. But it was also pointed out in the opinion that had the defendant proved title to herself in the land the suit could not have been maintained by the plaintiff, for the reasons given in *Jochen v. Tibbells*, 50 Mich. at page 36, where it was said that if—

"The landlord seeks to recover the possession he can do so under the lease; but if he goes further, and claims the premises in fee, the tenant is not estopped from denying any right claimed by the plaintiff further or greater than that of possession. This fully protects the landlord, who regains his possession, and, the tenant having gained no advantage by taking a lease, the parties then are in proper position to litigate the title should they desire so to do. If the plaintiff's position is correct, a judgment in fee may be obtained by estoppel against the tenant, and thus the landlord has acquired an advantage which he would not be entitled to."

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This is exactly what has been done in this case. The verdict was directed by the court, that the plaintiff was well entitled to hold the premises in fee, and against the defendant for possession; and without any title at all the plaintiff has judgment against the defendant for the fee of the land. It is true, when the case was here on the other record, we said that such a judgment might be entered as against a mere intruder upon the possession of one having prior possession, and being ousted by such intruder; and that, against such an intruder, the person first in possession, claiming title, has a valid, subsisting interest, amounting to a *prima facie* title in fee. The trial court undoubtedly intended to follow our ruling when he directed the verdict as he did upon the last trial.

But upon the first trial Mrs. Hill made no proof of any right or title in herself to the premises, and this was the controlling fact which ruled our holding when the case was first here. Upon this record, it appears that she proved at least an equitable title to or interest in the land, entirely independent of and adverse to any claim of plaintiff. She showed a patent from the United States to Charles J. Lanman, September 10, 1838. She also introduced the records in the office of the register of deeds of Berrien county, which showed a deed by Lanman and wife to Stanley H. Fleetwood, September 13, 1850, and by Fleetwood to Charles Butler, May 1, 1852, by Butler to Clinton B. Fiske, July 6, 1853, and by Fiske to James B. Crippen, May 16, 1855. These deeds were all recorded on and before May 18, 1855. It was also shown that February 9, 1866, Crippen sold this land to Greenleaf Glidden upon a land contract. This contract was recorded, but was not acknowledged, and was shown by the record. Crippen died in 1869, and left a will in which he directed his executors to

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sell all his lands. His wife was appointed executrix in his will, in company with Clinton B. Fiske and David B. Dennis. Mrs. Crippen alone qualified, for what reason the probate records fail to show. Glidden assigned his contract to the defendant, and Mrs. Crippen ratified it, and, as executrix, deeded the land to Mrs. Hill, January 18, 1872.

The deed from Lanman to Fleetwood was executed in Connecticut before one John T. Waite, purporting to be a commissioner of deeds, within that state, for the State of Michigan. It was objected to because it did not purport to be executed and acknowledged according to the laws of the State of Michigan, because the record did not show that the acknowledgment bore the official seal of the commissioner. The record of the deed from Fleetwood to Butler was also objected to, because the acknowledgment did not recite "that it was executed according to the laws of the State of Michigan, or that the execution of the same was the free act and deed of the grantor." It was acknowledged before a commissioner of deeds in the state of New York. The deed from Mrs. Crippen, as executrix, was objected to for the reason that it was executed and acknowledged by her alone, and was never signed or acknowledged by Clinton B. Fiske or David B. Dennis, executors named in her husband's will. The record of the contract to Glidden was objected to because there was no law authorizing its record, it not being witnessed or acknowledged. These evidences of title in Mrs. Hill were all received by the court, in the first place, when offered in evidence, under the objections above noted. By his ruling afterwards, he evidently held the chain of title not complete, but in what respect is not shown by the record.

Conceding that the chain of title from the United States to Mrs Hill was not established, was there enough

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shown to permit her to contest the title of the plaintiff, or his *prima facie* title arising out of his prior possession? There was certainly enough to show that she was more than a mere intruder without any claim of title whatever. She has certainly shown an attempt to convey the title from Lanman through mesne conveyances, and the equity of none of them is controverted. There is nothing tending to show a want of good faith in any one of the conveyances. She has not the legal title simply because of defects in the acknowledgments of some of the deeds.

But it is said that, her title or interest being merely an equitable one, it cannot be shown as a matter of defense in an action of ejectment. It has been held by this Court many times that an equitable title cannot be set up against the legal title. *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Id. 122; *Conrad v. Long*, 33 Id. 78; *Harrett v. Kinney*, 44 Id. 457 (7 N. W. Rep. 63); *Yale v. Stevenson*, 58 Id. 537 (25 N. W. Rep. 488); *Geiges v. Greiner*, 68 Id. 153 (36 N. W. Rep. 48). But this is not setting up an equitable title against a legal title. The cases above cited are those where the legal title was fully established, and the evidence of the equitable title was sought to be introduced to overthrow the legal title, which, without such evidence, was admitted. But here the plaintiff is shown to have no title. The title or interest of the defendant is independent of the title claimed by plaintiff, and has no connection with it. If plaintiff's tax titles are void, as they seem to be conceded to be, his only right to the premises is the right of possession under color of title, as against a mere intruder, without any title, which in law, as against such intruder, will be deemed a *prima facie* title in fee. But with the defendant in possession, when plaintiff commenced his action of ejectment, with an equitable title or interest in the land, and the plaintiff without title, although

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defendant might be estopped, by her agreement with Streeter, from disputing plaintiff's right to the possession, can he recover against her the the title in fee to the premises? We think not. He would thereby gain an advantage over the defendant that he was not entitled to. *Jochen v. Tibbells,* 50 Mich. 36.

Plaintiff's action for his possession, if he was entitled to it, should have been by summary proceedings under the statute. If he chooses to bring ejectment, he must be prepared to show some interest in the land other than a naked right to the possession. He must have "a valid, subsisting interest" in the premises as well as the right to possession. How. Stat. § 7790. The right of possession under color or claim of title may be *prima facie* title as against a mere intruder, but when an equitable interest is shown by the defendant in the land, an equity unconnected with and independent of plaintiff's claim of title, such defendant may show, in defense to the action of ejectment which has been planted against him, that plaintiff has no title at all to the premises.

The judgment must be reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

SARAH MCNUTT v. ROSCOE D. DIX.

Principal and agent—Sale—Purchase by agent.

Plaintiff, a resident of the State of Ohio, as one of the heirs of her mother, of whose estate defendant was administrator, was the owner of an undivided one-fifth interest in 80 acres of land, which she agreed to sell for $450 to another heir upon the

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advice of defendant, who negotiated the sale, and to whom plaintiff forwarded a deed in which the consideration was fixed at $450 and the name of the grantee left in bank. The proposed purchaser failing to complete the purchase at once, the defendant, without the knowledge of his wife, inserted her name in the deed as grantee, and forwarded to the plaintiff the $450. A few days afterwards the defendant sold the interest conveyed by said deed to the same proposed purchaser for $600, and the plaintiff brought this suit to recover the $150 received in excess of the $450 remitted to her, claiming that defendant was acting as her agent in the entire transaction, and that the money received on the sale belonged to her; in which contention she is sustained by the Court.

Error to Berrien. (O'Hara, J.) Argued October 29, 1890. Decided November 21, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Spafford Tryon and *George S. Clapp,* for appellant.

Theo. G. Beaver (Marshall L. Howell, of counsel), for plaintiff.

CAHILL, J. The plaintiff, as the daughter and one of the heirs at law of Margaret Hastings, deceased, owned an undivided one-fifth interest in 80 acres of land in Berrien county, in this State. She resided at Fredericktown, Ohio. Her brothers and sisters resided in this State. One of her brothers, John Hastings, was proposing to buy the claims of the others interested in the estate, and, with that purpose in view, had bought one share, being one-fifth, for $300, and had contracted for and subsequently concluded a purchase of another share at $450. He had also written to the plaintiff in regard to purchasing her share.

The defendant was the administrator of Margaret Hastings' estate. There were no debts to be paid, and the only thing to be done in the settlement of the estate was

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the division of this land and some small amount of personal property between the heirs. On February 24, 1888, the plaintiff and her husband wrote the defendant the following letter:

"FREDERICKTOWN, O., Feb. 24, 1888.

"ROSCOE D. DIX,—

"*Dear Sir:* As you are appointed administrator of estate of Margaret Hastings, deceased, and we being heirs at law, we would like to be informed regarding said estate. What are the prospects of selling the farm? We have understood that John Hastings has bought out one of the heirs, and wants a controlling interest in lieu of forcing the remaining heirs to a sale. Can it be done according to the laws of your State? And we have no recourse but submit to a sacrifice. Please oblige the undersigned,

"BENJAMIN MCNUTT and SARAH MCNUTT.

* * * * * * * * * * * *

"Since writing the above, I have thought of another item. If John Hastings has his own individual interest set off, can it be done clear of the mortgage now on the farm?

"BENJAMIN and SARAH MCNUTT."

To this letter defendant made reply as follows:

"LAW OFFICE OF DIX & WILKINSON.

"ABSTRACTS OF TITLE, REAL ESTATE, LOANS, COLLECTIONS.

"BERRIEN SPRINGS, MICH., Feb. 27, 1888.

"BENJ. MCNUTT,

"Fredericktown, O.

"*Dear Sir:* Your favor 24th at hand. In reply to your several inquiries, will say, first, the place cannot be sold for six months. The mortgage on the place now amounts to about $1,400, and draws interest at eight per cent. The expense of administration and sale of place will amount to about $260; funeral expenses, $40; interest on $1,400 for six months, eight per cent., $56; total, $1,756; taxes 1887, $44,—making in all $1,800. The place will sell in the fall for about $4,000, not to exceed $4,200. Deduct $1,800 from $4,200, leaves $2,400. Divide by 5, makes each share $480. Take $1,800 from $4,000, leaves $2,200. Each 1-5 share is worth $440. John has bought 1-5 interest at $300. He will have another share to-morrow at $450,—Mrs. Shearer's,—and I have no doubt

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he will give your wife the same, and close it all out. I advised Mrs. Shearer to sell at $450. It closes it all up at once, and otherwise it will run until fall, and then perhaps no one to buy even at $4,000, and in case did not sell would be to the expense of advertising again, and the interest of the mortgage going on all the time, and increasing the claim thereof. I would also advise you to sell at $450. I send deed herewith, and in case you conclude to sell please have Mrs. McNutt sign same, acknowledge, and then send to me, and I will remit you money by draft at once. After signing deed and acknowledging before a justice of the peace or notary public, then send it to your county clerk, and get his certificate attached similar to one I inclose, and return same, or send to me. * * * * * * * * * *

"ROSCOE D. DIX."

Upon the receipt of this letter, plaintiff executed the deed, and returned it to the defendant on March 3, 1888. In this deed the name of the grantee was left in blank. On receipt of it, defendant claims that he saw John Hastings at his (defendant's) office, told him that he had received the deed from Mrs. McNutt, and asked him if he would take it and pay the $450. He says this conversation with John Hastings was on the 7th, 8th, or 9th of March, and he thinks that on each of those days he had conversations with him about the deed, and in which he advised him to accept the deed and pay the money, but that on each occasion John said he was unable to do so. On March 7, defendant remitted to plaintiff $450, which was the consideration named in the deed, and on March 9 he wrote his wife's name in the deed as grantee, and put the same on record. It is conceded that this was done without any knowledge on the part of defendant's wife, and that she was not in fact the purchaser of the land, but held it for defendant. The defendant had in the meantime purchased the interest of one of the other heirs, so at this time he had one

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share, the plaintiff's share stood in the name of defendant's wife, and John Hastings had three shares. On April 2 following, John Hastings purchased of defendant the two shares held by himself and his wife, for $600 each.

This suit is brought to recover the $150 received by defendant from John Hastings over and above the $450 already remitted, upon the theory that defendant, in making such sale, was acting as the agent of the plaintiff, and could not therefore lawfully purchase the same himself in his own name, or in that of his wife; that, in the subsequent sale of the land to John Hastings for $600, he was still acting as the agent of the plaintiff; and that the money received on such sale belongs to the plaintiff.

The defendant claimed that the letter of February 27 was written in good faith, and correctly stated all of the facts within his knowledge at the time concerning the situation of the estate, and the value of the property; that he fully expected that John Hastings would take the plaintiff's interest, and pay for the same as stated; that, when the deed was received by him, he gave John Hastings every opportunity to take the land if he desired it, but that, having refused to do so, he felt himself at liberty to take the land himself at the same price; and that, as the plaintiff received all the money she expected to receive for her interest, she had no right to complain.

There is some force in the position taken by defendant, under the particular circumstances of this case; but there are certain legal principles which stand in the way of his being permitted to keep the money received by him on the sale of this property, if he had undertaken to act for the plaintiff as her agent in making this sale. The law is very strict in scrutinizing the conduct of those

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who are acting in a fiduciary relation. In *Moore v. Mandlebaum*, 8 Mich. 442, this Court, in speaking of one who had assumed to act as the agent of another, said:

"In that confidential relation he was bound to the utmost degree of good faith, and had no right, while professing to act in that capacity, to make himself the agent of other parties for the purchase of the lands he was authorized by the plaintiff to sell, nor to take any advantage of the confidence his position inspired to obtain the title himself. Nor could he make a valid purchase from his principal while that confidential relation existed without fully and fairly disclosing to his principal all the propositions he had received, and all the facts and circumstances within his knowledge, in any way calculated to enable his principal to judge of the propriety of such sale."

In *People v. Board*, 11 Mich. 225, it was said:

"So careful is the law in guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like."

Applying these principles to the case at bar, is it not clear that by his letter of February 27 the defendant undertook to act as the agent of the plaintiff in negotiating the sale of her interest in the property to her brother John? In receiving the deed sent to him with the name of the grantee left blank, the defendant would have no authority to insert the name of the grantee, except upon the theory that he was the plaintiff's agent, and had authority from her for that purpose. Under such circumstances, the law says that defendant had no right to insert his own name, or, what would be the same thing in this case, that of his wife, as purchaser of this land. Nor does it avail the defendant that in this particular case he was acting in good faith, and in the honest belief that he had a right to do what he did do. The wholesome rule of law is one that applies to all transactions

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of this character, and courts will not stop to inquire as to the motive or intent of parties in particular cases, where it appears that the rule has been violated. Under the circumstances of this case, the money received by defendant from John Hastings, less the amount already paid by him to plaintiff, must be held to have been received for the plaintiff's use, and was rightly recovered under the declaration for money had and received.

The circuit judge instructed the jury in accordance with this view, and the judgment must be affirmed, with costs.

The other Justices concurred.

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ADELAIDE HAMMOND, ADMINISTRATRIX, ETC., v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Negligence—Railroad companies—Injury to section employé—Fellow-servants—Contributory negligence—Evidence.

1. Without deciding whether, under all circumstances, a section foreman must be considered as a fellow-servant of the men working under him, so as to relieve the common employer from liability for his negligence, it is very clear that where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to, by the injured workman, with full knowledge of the peril, the question of the master's liability does not arise.

   So *held*, where the negligence charged was that, with knowledge of an approaching train, the section foreman continued to propel a hand-car along a curved portion of the track running through a deep cut without sending a lookout ahead to give warning, in which conduct the injured workman participated with full knowledge of the hazard, he having been running up and down the same section daily for three months, and it not appearing that he was acting under the express orders of the

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foreman in remaining on the car, or that he remained thereon against his will.

2. In such a case evidence that the foreman was intemperate to an extent which made him an unsafe and unfit man for his position is irrelevant, it not being claimed that he had been drinking, or was under the influence of liquor, on the day of the accident.

Error to Ingham. (Peck, J.) Submitted on briefs October 31, 1890. Decided November 21, 1890.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Frank L. Dodge (*C. P. Black*, of counsel), for appellant, contended:

1. The jury are to decide all questions of fact where different inferences might be drawn or different conclusions reached by different individuals; citing *Mining Co. v. Brady*, 16 Mich. 332; *Teipel v. Hilsendegen*, 44 Id. 461; *Spicer v. Bonker*, 45 Id. 630; *Marcott v. Railroad Co.*, 47 Id. 1.

2. A trial judge should never take a case from the jury on the evidence unless it is very clear, and when he does so he should specify the particular ground or grounds of his ruling; citing *Conely v. McDonald*, 40 Mich. 150; *Demill v. Moffatt*, 45 Id. 410; *Marcott v. Railroad Co.*, 47 Id. 1; *Goodale v. Bridge Co.*, 55 Id. 413; *People v. Eaton*, 59 Id. 559; *Carver v. Plank-road Co.*, 61 Id. 584; *Stockham v. Cheney*, 62 Id. 10; *Gibbons v. Farwell*, 63 Id. 344; *Manf'g Co. v. Car Co.*, 65 Id. 564; *Charon v. Lumber Co.*, 66 Id. 68; *Alexander v. Big Rapids*, 70 Id. 224; *Boick v. Bissell*, 80 Id. 260; *Brezee v. Powers*, Id. 172.

L. C. Stanley and *R. A. Montgomery*, for defendant.

CAHILL, J. The plaintiff brings this suit as the wife of Charles Hammond, who was killed on Sunday, August 5, 1888, about 9 o'clock in the forenoon, on defendant's railroad track near Warner's crossing, in Shiawassee county, by a westward-bound passenger train over defendant's road.

The deceased had been in the employ of the defendant about three months as a section hand on the particular

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section of road where the accident occurred. He was a middle-aged man, and of ordinary intelligence. On the morning of the accident, Hammond, in company with Charles Haley, the section foreman, and Fred King, a fellow-laborer, started with a hand-car from the car-house at Shaftsburg, about 8 o'clock, standard time, on a tour of inspection. They went west about five miles, and started back. When they were about 150 feet west of Warner's crossing, and while they were looking out for a train, they saw the smoke-stack over the bank to the left of the road, and at a distance in front of them of about 50 rods. The whistling-post was 40 rods east of the crossing. At the same moment they heard the whistle. Commencing a short distance east of the crossing was a curve in the road, running through a deep cut, the sides of which were about 25 feet high, so that a train approaching from the east could not be seen by persons at or west of the crossing until it had approached to the point near the whistling-post, where the deceased, and those who were with him, saw it on the morning in question. Fred King, who was on the hand-car at the time, says they were going very slowly, about five miles an hour.

"We were all on the watch of the curve, looking out, providing anything should appear to our sight in the shape of a train or smoke-stack. We were all on the watch, and as we were approaching along, with our eyes directly ahead watching for smoke or sound, we all at once saw the smoke just right up over the bank, at the edge of the bank, at the slope, and I immediately put my foot on the brake at my side,—I am always ready for it,—and Mr. Hammond just whirled, jumped in front of the car, and caught it, and Mr. Haley dropped off at the back, and we stopped the car, and I jumped off, with Mr. Haley, at the back. We caught hold and swung it round, leaving the two front wheels in the center of the track, kittering crosswise. We pulled on it twice. I then sprung to the front part of the car, and caught hold of the handle, and lifted that wheel that was just inside the

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rail. Mr. Haley was pulling on the other end in the ditch. I pushed twice. It did not go. Then I took thought, and sprung right to one side, and hollered: 'Let her go. Out of the way!' And just at that everything went smash. When I hollered, 'Let her go. Out of the way!' he [Hammond] immediately looked back over his right shoulder, wild; made two or three steps, running down the track, kittering like with the car, running down the track to get out of the way. The last I seen him he looked very wild, as he was on the go,—wild and frightened."

The witness further testified that, after helping Haley lift over the west end of the car from the track, he stepped around to the other end with Hammond to help him, both having their backs towards the approaching train, and both standing inside the rails; that, at the time he called "Look out," Hammond could have stepped out of danger by taking two steps, but that, being bewildered, he took as many along the track, instead of over the track, when he was struck by the train and killed. The train was not a regular passenger train but what is known as a "wild" train. Dorr Schaft, a witness for the plaintiff, testified that he heard a conversation between the agent and operator at Shaftsburg and Mr. Haley that morning with reference to special trains being on the road.

"Think he said, 'There is one special train,' and that he told it to all of us. He was talking to Mr. King, Mr. McConnell, Charles Hammond, Charles Haley, and witness. Did not know what train he referred to; he said, 'Look out, there is a special coming.'"

The operator, when called as a witness, said he told King about the special train, but did not think the others heard it. It is quite evident, however, that all of the men were expecting and looking out for this train, and were taking some precautions against meeting it by going

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slowly, and keeping a sharp lookout as they approached the curve in the road.

The negligence of the defendant, set out in the amended declaration, which is the only count upon which a recovery could be claimed on this record, is as follows:

"And the plaintiff avers that it became and was the duty of the defendant to provide a careful, competent, skillful, and painstaking foreman to manage, control, direct, and supervise the aforesaid work, in which the said Charles W. Hammond was engaged [meaning the work of operating the hand-car], and the said Charles W. Hammond, as such employé, had a right to rely upon the said Charles Haley, as his foreman and superior officer, as being such careful, skillful, and painstaking foreman, and that he would take every possible care and precaution in propelling the said hand-car over the aforesaid section in a careful and prudent manner, and not endanger the life of the said Charles W. Hammond; and the plaintiff further avers that the said Haley was not a careful, skillful, and cautious person, but was notoriously wanting in such care, skill, and prudence, as to entirely unfit and render him incompetent to have charge of such work as had been intrusted to him by said defendant; which fact the defendant then and there well knew, or might have known had it used proper care and diligence, as it was in duty bound to use, to ascertain the competency and care of said Haley; and yet the defendant negligently and wantonly retained said Haley, as such foreman, in its employment.

"And the plaintiff further avers that the said defendant did, to wit, on the said 5th day of August, cause to be operated and run over and along the line of said railroad a wild locomotive engine, or extra engine, and train, not then and there running on any regular or schedule time of the defendant, and the said locomotive or extra engine and train passed Warner's crossing at or about the hour of 9 o'clock on the forenoon of said 5th day of August; and the said Charles Haley, foreman and manager of said section, as aforefaid, was duly informed and apprised of the coming of the said wild or extra engine and train, and it then and there became and was his duty to take every possible precaution in propelling the said hand-car over the said section then in his charge, and to

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avoid any accident or collision with the said wild or extra engine and train. Yet he, the said Charles Haley, entirely disregarding his obligation and duty, and with great recklessness, directed and caused said hand-car to be propelled and run from west to east over and along the aforesaid section at the time that he well knew that the said wild or extra engine and train was approaching from the east, and within a short distance, to wit, fifteen feet, of said Warner's crossing, which crossing is situated at a point about two miles west of the village of Shaftsburg, on the line of said defendant's railroad, where the track passes through a high embankment upon each side of the said defendant's railroad, and upon a sharp curve, whereby the view of an approaching train from the east is entirely cut off and obscured until said train approaches within a short distance, to wit, thirty rods, of said Warner's crossing; and it then and there became the duty of said Charles Haley, as such foreman, in approaching said Warner's crossing, to stop said hand-car at a safe point west of said crossing, to wit, 50 rods west of said crossing, and ascertain whether there was a train of cars approaching over said defendant's track from the east which would be liable to collide with said hand-car, in the aforesaid dangerous part of said defendant's track.

"And the said plaintiff further avers that the said Charles Haley entirely failed to take such care or such other precaution as would enable him to avoid the danger of a collision with the train approaching from the east, but did, to wit, on the day and year aforesaid, carelessly and heedlessly direct and cause the said hand-car to be propelled, as aforesaid, from the west to the east to within eight rods, or thereabouts, of said Warner's crossing, whereby a collision occurred with the aforesaid wild or extra engine and train, to wit, one hundred and thirty feet west of said Warner's crossing, whereat he, the said Charles Hammond, deceased, was injured, and his death immediately ensued from said injury."

The only evidence in the record that tends in any manner to show that Haley was guilty of negligence on the morning in question is that which shows that, with the knowledge of an approaching train, he continued to propel the hand-car along the track in the manner hereto-

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fore shown, without sending a lookout ahead to give warning. But if this conduct was negligent, it was participated in by Hammond. The latter had been going up and down this section of the road daily for three months. Whatever hazard there was in such a position was known to him, and he must be held to have voluntarily assumed it. It does not appear that Hammond was acting under express orders from Haley in remaining on the car, or against his will. The theory of the declaration is that Haley, the section foreman, had, by virtue of his position, such a control over Hammond, and such a right to direct his actions and movements, as to relieve the latter of all responsibility for his own negligence in remaining on the car under circumstances of danger; that Hammond was without fault so long as he submitted himself passively to the control of Haley. I do not find it necessary here to decide whether, under all circumstances, a section boss must be considered as the fellow-servant of the men working under him, so as to relieve the common employer from liability for his negligence. I am very clear that where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to, by the person injured, with full knowledge of the peril, the question of the master's liability does not arise.

In this view of the case it becomes unnecessary to examine the more difficult question as to whether plaintiff's husband was guilty of contributory negligence in remaining on the track so long, while attempting to remove the hand-car, in the face of the approaching train. To leave the hand-car on the track without any attempt to remove it would have been inexcusable. Its presence there was a menace to the lives of the passengers on the train. It was the duty of the men in charge of

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it to remove it, if they could do so without serious risk to themselves. That duty must be performed in great haste, without opportunity to estimate time or to calculate chances. The natural excitement of such a position of peril might well unfit a man for the exercise of that *reasonable* care which it is said one must exercise to avoid negligence. If, therefore, it appeared that defendant, through negligence, had induced Hammond to incur this danger, I am not prepared to say that his conduct at that moment showed him to be guilty of contributory negligence.

There was evidence tending to show that the section foreman was intemperate to an extent which made him an unsafe and unfit man for the position he held, but, as it was not claimed that he had been drinking, or was under the influence of liquor, on the day of the accident, it was irrelevant.

When the plaintiff had rested her case, the court directed a verdict for the defendant. It does not appear upon what ground. The instruction was correct on the ground that there was no evidence of defendant's negligence of which plaintiff's husband was not equally guilty.

The judgment is affirmed, with costs.

The other Justices concurred.

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WILLIAM H. STEVENS v. WILLIAM E. PENDLETON AND WILLIAM D. MORTON.[1]

Principal and surety—Change in contract—Release of surety—Burden of proof.

1. The change in the terms of an agreement which will operate to discharge a surety must have been made by the *intentional* act of the original parties.

2. A land-owner agreed to advance a specified sum, to be used in erecting a hotel on the land, which the party to whom the advances were to be made was to lease for a term of years at a fixed rental, payable quarterly *in advance*, for the payment of which rent a third party became surety. After the completion of the buildings a lease was executed between the parties, by which the rent was made payable at the *end* of each quarter. Suit was brought against the lessee and the surety upon the original agreement to recover rent, after which the lessor filed a bill to reform the lease so as to conform to the agreement as to the time of payment of rent, he claiming that the change was made by mistake in drafting the lease. The surety was not made a party, and a *pro confesso* decree was secured reforming the lease, as prayed. On the trial of the suit at law the decree and anterior proceedings were received in evidence without objection. The surety introduced the testimony of two witnesses tending to show that the change as to time of payment of rent was intentional, which testimony was uncontradicted. The circuit judge held that the surety was discharged, and directed a verdict for the defendants, and in affirming the judgment it is held:

a—As between the parties to the chancery suit, the decree is conclusive that the change as to time for payment of rent was made by mistake; but the same rule does not apply to the surety, who if made a party, could have shown in the chancery suit, and may show in the suit at law, that the change was intentionally made, thereby discharging him from liability.

b—This defense is made out, *prima facie*, by the introduction of the lease, and is rebutted by the introduction of the enrolled decree, and the burden is cast upon the surety to negative the

[1] A rehearing was ordered in this case December 24, 1890, and the case reargued February 13, 1891.

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alleged mistake, which he is held to have done by the testimony of the witnesses before referred to.

Error to Wayne. (Hosmer, J.) Argued November 11, 1890. Decided November 21, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Barbour & Rexford, for appellant, contended:

1. Sureties are undoubtedly concluded by the judgment against their principals when it has been obtained in the customary manner, and in the course of regular proceedings; citing *Wright v. Hake*, 38 Mich. 525, 531; *Lowell v. Parker*, 10 Metc. 309; *Bradwell v. Spencer*, 16 Ga. 578; *Huzzard v. Nagle*, 40 Penn. St. 178; *Drummond v. Prestman*, 12 Wheat. 515.
2. When the suit is against the principal and surety jointly on a joint or joint and several obligation, an admission or declaration of the principal which is competent evidence against him is also generally held to be competent evidence against the surety; citing Brandt, Sur. § 519; *M'Neale v. Governor*, 3 Gratt. 299; *Bank v. Brownell*, 9 R. I. 168; *Bank v. Root*, 2 Metc. 522; and if a fact may be so proved against a surety by the admissions of the principal, then why not by the more solemn act of confessing it of record? citing *Drummond v. Prestman*, 12 Wheat. 515; and hence it clearly follows that Morton was not a necessary party to the chancery suit in order that the decree should be at least *prima facie* evidence against him.
3. No person need be made a party who would not be at liberty to answer, and contest the right to the relief prayed; citing Barb. Par. 452; *Lee v. Colston*, 5 T. B. Mon. 245; and it is a general rule that no one need be made a party against whom, if brought to a hearing, the complainant can have no decree; citing *De Golls v. Ward*, cited 3 P. Wms. 311 (note); Barb. Par. 457; and, generally, no one ought to be made a party against whom the complainant can have no decree; citing 6 Am. & Eng. Enc. Law, p. 744, and note.
4. An agreement with the principal to vary the contract must obviously be ineffectual as a legal discharge of the surety whenever it is legally inoperative, whatever the cause that interferes with its operation: citing *Rees v. Berrington*, 2 Lead. Cas. Eq. (4th Am. ed.) 1876.

Dickinson, Thurber & Stevenson, for defendants.

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CHAMPLIN, C. J. On December 21, 1886, William H. Stevens entered into a contract in writing, by which he agreed to loan and advance to William E. Pendleton not exceeding $10,000, for the purpose of erecting a hotel or road-house, including barns, outhouses, sheds, etc., on land belonging to Stevens, to be built according to the plans and specifications of the architect under the supervision of Pendleton. When it was completed and ready for occupancy, Stevens was to lease the buildings to Pendleton for a period of 10 years from the date of the lease, and he was to pay Stevens 6 per cent. interest on whatever sum the buildings cost, not exceeding $10,000, from the date of the advances until May 1, 1887. As soon as he commenced to occupy, Pendleton was to pay, for a period of five years, as rental, a sum equal to 6 per cent. of the total cost, and for the four acres of land upon which it was erected a rental equal to 6 per cent. on $2,000, and for the next five years a rental equal to seven per cent. of the total cost of the buildings and improvements, and on the value of the land as aforesaid; and he was to keep the buildings insured to three-fourths of their value, for the benefit of Stevens, and pay the taxes assessed thereon. The rent was to be paid quarterly on the *first* day of each and every quarter.

The following agreement was annexed to or underwritten such contract, viz.:

"In consideration of the erection of said buildings, and the leasing of the premises above described, and for the sum of one dollar to us in hand paid, we do hereby become surety for the punctual payment of the interest and rent and the performance of the covenants in the above-written agreement and lease mentioned, to be paid and performed by said W. E. Pendleton, as therein specified; and, if default shall at any time be made therein, we do hereby promise and agree to pay unto the said W. H. Stevens the said rent, or any arrears thereof, that may be due, and fully satisfy the conditions of the said agree-

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ment or lease, and all damages that may accrue by reason of the non-fulfillment thereof, without requiring notice or proof of demand being made.

"Given under our hand and seals, this 21st day of December, A. D. 1886.

[sd] "WM. E. PENDLETON.
[sd] "WM. D. MORTON."

A written lease was entered into, dated May 1, 1887, between Stevens and Pendleton, fixing the annual rental, and requiring it to be paid quarterly, on the *last* day of each and every quarter. This action was brought, based upon the agreement above set out, to recover rent which the plaintiff claims was due and unpaid.

After the suit was begun, Stevens filed a bill in chancery in the circuit court for the county of Wayne against Pendleton, in which Morton was not made a party, to reform the lease so as to provide that the rent should be due and payable on the *first* day of each quarter, instead of the *last* day, basing his right to such decree upon the agreement above set forth and a mistake in drafting the lease. This suit was not defended, and a decree *pro confesso* was entered on December 13, 1888, in which it was decreed that the lease should be and was thereby reformed, "so that, by the terms thereof, the rental therein agreed to be paid by the said defendant shall be payable quarterly on the first day of each and every quarter during the term of said lease, instead of on the last day of each and every quarter during the term of said lease." The bill of complaint and decree were introduced in evidence without objection.

There were several questions raised upon the trial, but which we do not consider it proper for us to pass upon, as only one question necessarily disposes of the case. Counsel for defendant Morton took the position in the court below that their client was absolutely discharged from all liability on his agreement of suretyship, for the

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reason that the time of payment of rent was changed, without his knowledge or consent, from the first day of each quarter to the last day, and no decree of court made in a suit where he was not a party could, by reforming the lease, impose a liability upon him from which, by the act of the plaintiff and the principal, he had been discharged. This leads to the inquiry whether there has been a change of the terms of the lease from that which Morton agreed to answer as surety. The law is settled that if the parties to a contract alter the terms of the agreement for which a surety has become bound, so that it is materially different from what it originally was, the surety will be discharged. There are exceptions to the rule which need not be noticed here. But it must be borne in mind that such alteration, to have the effect to discharge the surety, must have been an intentional act of the parties. If it was done by mistake, and without an intention to vary the terms of the agreement, the surety is not discharged. The decree of the court in this case has settled that question, as between the parties to that suit, that the time of payment in the lease was, by mistake, made to read the last instead of the first day of the quarter.

But it is urged that the surety was a proper, if not a necessary, party to the suit to reform the lease. This is undoubtedly true. If he had been made a party he might have interposed the defense that the change was intentionally made, and hence be discharged from liability. The decree, therefore, is not conclusive upon him, and the same defense is open to him in this suit as would have been in the chancery suit. He may show that the variance was intentional; and his defense is *prima facie* made out when the lease is introduced. But this again was rebutted when the proceedings, including the decree, in the chancery suit were introduced in evidence. This was

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evidence of the mistake, and conclusive between the parties, and, while not conclusive as against defendant Morton, it was *prima facie* evidence of the fact, and the burden was upon him to show that the minds of the parties met as to time of payment specified in the lease. He did show by the witness Pendleton, who was a party to the lease, that the rent was payable at the last of the quarter, according to its terms. In addition to this, the agent of plaintiff, Fremont Woodruff, was sworn, and testified on behalf of the plaintiff as to the rent due upon the lease; being, as he testified, the rent due for the balance of the quarter ending October 31, 1887, for the quarters ending January 31, 1888, April 30, 1888, and July 31, 1888. These dates correspond with the times specified in the lease before it was reformed. There was no testimony contradicting these two witnesses, and consequently the court was right in holding the surety discharged and directing a verdict for defendants.

The judgment is affirmed.

The other Justices concurred.

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HARRY BATES v. HUGH SMITH.

Sale—Subject-matter—Bona fide purchaser—Increase of live-stock—Notice.

1. It is essential to the validity of every *executed* contract of sale that there should be a subject-matter to be contracted for; and if it appears that such subject-matter was not, and could not have been, in existence at the time of making the contract, it is of no effect, and may be disregarded by either party.[1]

[1] See *Sherwood v. Walker*, 66 Mich. 568.

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2. Notice to the purchaser of a mare that she had been bred to a certain stallion is not sufficient to put him on inquiry as to any rights the owner of the stallion might have or claim growing out of such fact.

Error to Saginaw. (Gage, J.) Argued November 11, 1890. Decided November 21, 1890.

Trover. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Brooks & Conway, for appellant, contended:

1. As it was impossible for Fraser to deliver the colt to plaintiff before it was born, the question of innocent purchaser has no application; citing *Hull v. Hull*, 48 Conn. 250; *Wolcott v. Hamilton*, 61 Vt. 79; *Andrew v. Newcomb*, 32 N. Y. 417; *Tuttle v. Campbell*, 74 Mich. 652; *Andrews v. Cox*, 42 Ark. 473.
2. Anything having a potential existence, that is, anything which is the natural product or expected increase of something already belonging to the vendor, may be sold; citing Benj. Sales, § 78; *Hull v. Hull*, 48 Conn. 250; *Andrews v. Cox*, 42 Ark. 473; *M'Carty v. Blevins*, 5 Yerg. 195; *Sawyer v. Gerrish*, 70 Me. 254; 1 Pars. Cont. 523, note *k*; Hill. Sales, § 18; Story, Sales, § 186.
3. We do not think defendant can be considered, in any sense, a *bona fide* purchaser of the colt; but, if he were, he could acquire from Fraser only his half interest therein; citing *Tuttle v. Campbell*, 74 Mich. 652; *Andrews v. Cox*, 42 Ark. 473.

Trask & Smith, for defendant, contended for the doctrine stated in the opinion.

LONG, J. This is an action of trover to recover the value of a one-half interest in a colt.

The claim of the plaintiff is that he bred the mare of one James Fraser upon shares. The contract, as stated by the plaintiff, is that Fraser came to his farm, and said he wanted to breed his mare to the stallion American Boy, then kept by plaintiff, and that he had no money; that plaintiff then told him he would breed the mare on shares, and, if Mr. Fraser would come to him at any time

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within two weeks and give him $50 for the services of the horse, Fraser could have his (the plaintiff's) half-interest in the colt; that the mare was then and there bred under that arrangement, but no written contract was made. James Fraser was called as a witness for the defendant upon the trial, and testified:

"My bargain with plaintiff was that if I did not pay plaintiff fifty dollars within three months, for the service of the stallion, he (plaintiff) was to own a half-interest in the colt."

On cross-examination he states the arrangement substantially as claimed by plaintiff, except that he was to have three months in which to pay the money.

It appears that the mare was bred July 27, 1888, and that the defendant purchased her from Fraser on February 21, 1889, paying therefor the sum of $300. The defendant upon the trial stated that at the time he purchased the mare he had no knowledge that the plaintiff made any claim to her progeny, and that plaintiff never made any claim until the colt was four or five months old. It appeared, however, that before defendant bought the mare he was informed that Fraser had bred her to the stallion American Boy, then kept by plaintiff, but was not advised that any contract was made by which the plaintiff was to have a half-interest in the colt. Demand was made before suit was brought, and the defendant refused to recognize the plaintiff's interest.

Under these facts, the plaintiff's counsel requested the court to instruct the jury that Fraser could not sell the interest of plaintiff in the colt, and that the colt when foaled was the property in common of the plaintiff and defendant, and that the value of the one-half interest could be recovered in this action. This the court refused, and instructed the jury that if, at the time the defendant purchased the mare from Fraser, he

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had no knowledge of the arrangement made between plaintiff and Fraser, the title to the colt would pass to the defendant, but that, if he did have knowledge of it, the title would not pass. The jury found a verdict in favor of defendant. Plaintiff brings error. It is contended by plaintiff's counsel that the defendant was not in any sense a *bona fide* purchaser of the colt, but that, if he were, he could acquire from Fraser only his half-interest therein.

It is a general rule that owners in common of property have a right to dispose of their own undivided shares, but such owner cannot sell the whole property, nor any portion thereof except his own, and if he undertakes to dispose of any larger interest his co-owners are not bound thereby. *Russell v. Allen*, 13 N. Y. 173. The principle is well settled that a seller of personal property can convey no greater title than he has, and it makes no difference that the purchaser has no notice and is ignorant of the existence of the other parties in interest. *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Id. 158; *Tuttle v. Campbell*, 74 Id. 660.

Did the contract, however, which plaintiff claims he made with Fraser convey to him one half-interest? The property upon which the contract was to operate had no potential existence. The mare at that time had not been bred, and it was uncertain that, when bred, she would be put in foal. There was nothing in existence which could be the subject of sale. It is essential to the validity of every executed contract of sale that there should be a thing or subject-matter to be contracted for. And if it appears that the subject-matter of the contract was not, and could not have been, in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party. *Strickland v. Turner*, 7 Exch. 208; *Hastie v. Couturier*, 9 Id. 102, 5 H. L. Cas.

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673; *Franklin v. Long*, 7 Gill & J. 407. A mere possibility or contingency, not founded upon a right or coupled with an interest, cannot be the subject of a present sale, though it may be of an executory agreement to sell. *Purcell v. Mather*, 35 Ala. 570; *Low v. Pew*, 108 Mass. 347. Though the subject-matter of the agreement has neither an actual nor potential existence, such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover the damages. *Hutchinson v. Ford*, 9 Bush, 318; *Pierce v. Emery*, 32 N. H. 484.

Again, it may be said that, where one of two innocent parties must suffer by the fraud of another, he shall bear the loss who by his conduct has enabled such third party to perpetrate the fraud. If the contract was made as claimed by the plaintiff, and there does not seem to be much controversy on this point, yet the plaintiff had it in his power to protect himself, under the provisions of Act No. 280, Laws of 1887 (3 How. Stat. §§ 1621*a*—1621*d*), which provides that the owner or keeper of a stallion shall, after demand upon the owner of the mare for the price agreed upon for service, have a lien upon the get of such stallion for the period of six months after the birth of the foal, for the payment of the services of such stallion. In order, however, to perfect such lien, he must file with the township clerk in the town where such dam is owned the agreement, or a true copy of such agreement, entered into by the owner of the dam for such service, together with such description of the dam as to age, color, or other marks as the person filing such agreement is able to give. This filing is to operate, under the provisions of this act, as a chattel mortgage, and may be enforced in the same way. No such steps were taken. The mare remained in the possession of the owner, Mr.

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Fraser, from the time she was bred until in February following, when the defendant purchased her without any notice, so far as this record discloses, of the agreement made between plaintiff and Fraser. It is shown that defendant was advised at the time he purchased that the mare had been bred to American Boy, but no notice was given him that plaintiff had any claim on the foal, and there was nothing upon the record in the town-clerk's office to give him any notice that plaintiff claimed a lien upon or had any interest in the foal. It cannot be said that the mere fact of notice of the breeding of the mare to American Boy was sufficient to put him upon inquiry as to any rights the owner of the stallion might have. The defendant must be regarded as a *bona fide* purchaser and owner of the mare; and, the title and ownership of the foal following the dam, he was the rightful owner of the foal.

We see no error in the case, and the judgment must be affirmed, with costs.

The other Justices concurred.

HENRY H. APLIN, AUDITOR GENERAL, v. SERENA MCLAULIN.

Taxes—Cost of advertising and sale—Payment.

The one dollar which the Auditor General is authorized by section 52 of Act No. 195, Laws of 1889, to add to the amount of taxes due on a parcel of land, for advertising and other expenses of sale, cannot be demanded of the tax-payer until *after* the tax petition has been filed and published as provided by section 54 of said act.

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Appeal from Wayne. (Reilly, J.) Argued November 12 and 13, 1890. Decided November 21, 1890.

Petition for sale of delinquent tax lands under Act No. 195, Laws of 1889. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

B. W. Huston, Attorney General, and *Henry M. Duffield*, for complainant.

James H. McDonald, for defendant.

GRANT, J. Defendant was the owner of 58 parcels of land upon which she neglected to pay the taxes for the year 1887 when due, and they were returned for non-payment. On December 26, 1889, she tendered to the county treasurer the full amount of these taxes, with interest and charges, except one dollar on each parcel, which the county treasurer demanded for expenses of advertisement and sale. The county treasurer refused to accept the amount tendered, and she refused to pay the $58 demanded for such expenses.

Seven weeks after this tender, the Auditor General filed the petition for the sale of delinquent tax lands in the county of Wayne, making the defendant a party, and alleging that the lands were delinquent. These lands were returned delinquent before July 1, 1888. Decree was entered for defendant, and complainant appeals.

The demand of the Auditor General is based upon section 52, Act No. 195, Laws of 1889 (3 How. Stat. § 1170 *f* 1), the language of which, so far as it bears upon this question, is as follows:

"As soon as practicable after the first day of July in each year, the Auditor General shall prepare and file in the office of the county clerk in each county in which lands are to be sold under the provisions of this act, a

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petition addressed to the circuit court for said county, in chancery, * * * and he shall include with and add to such total amount against each parcel one dollar for the cost of advertising and other expenses of sale."

He contends that the law requires him to add the one dollar after the 1st day of July in each year after the lands are returned delinquent, and that it thus becomes a charge upon the land.

We cannot agree with this view of the law. The language itself will not admit this construction. The statute does not contemplate the preparation of the petition as an "expense of sale." The petition is prepared by salaried officers and clerks in the employ of the State, and no additional expense is necessarily incurred in the preparation. Besides, the Legislature, if they had intended to include such a charge, could readily have found apt words in which to convey such intention. No costs or expenses of sale in chancery proceedings are incurred until after the rendition of the decree. All the expenses before that are termed "costs of suit," and are taxed as such. We must presume that the Legislature used this language in the act with reference to its definite and well-understood meaning. We know of no rule of construction by which we can extend or enlarge its meaning.

The Legislature may fix a specific sum for the expense of advertisement and sale, and provide that said sum shall be included in the petition and decree. *Non sequitur* that the tax-payer is under legal obligation to pay it before any portion of such expense has been incurred. In the absence of express language, we cannot hold that the Legislature intended to impose so unjust and unnecessary a burden upon tax-paying citizens.

County treasurers are authorized to receive the taxes after the lands are returned delinquent. Section 49. To

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such taxes are to be added 1 per cent. per month, and 4 per cent. as a collection fee. No other charges can be added to any taxes voluntarily paid either to the township treasurer, county treasurer, or State Treasurer "except the expense after it accrues under section 52 of this act." The expenses of advertisement and sale cannot accrue until after the petition has been filed and published as provided by section 54. Before that, payments are voluntary.

Decree must be affirmed.

The other Justices concurred.

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THE PEOPLE v. PATRICK J. SULLIVAN.

Criminal law—Liquor traffic—Information—Amendment.

1. It is not necessary, in an information for keeping a saloon open contrary to the statute, to state that the respondent is not a druggist, the *name* in such a case distinguishing the *place;* citing *People v. Robbins*, 70 Mich. 130.
2. A complaint and warrant properly charged the respondent with the offense of keeping his saloon open contrary to the provisions of section 17 of Act No. 313, Laws of 1887. He waived an examination, and on the trial at the circuit the information was objected to for failing to allege that the respondent was not a druggist, or that the place kept open was not a drug-store, which negative averments were in the complaint and warrant, and the court allowed the information to be amended by inserting them therein. And it is held that the amendment was properly allowed, if one was at all necessary.

Exceptions before judgment from Chippewa. (Steere, J.) Submitted on briefs November 13, 1890. Decided November 21, 1890.

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Respondent was convicted of keeping his saloon open after legal hours. Conviction affirmed, and court advised to proceed to judgment. The facts are stated in the opinion.

C. W. Dunton (McMahon & Yerkes, of counsel), for respondent.

B. W. Huston, Attorney General, and *John H. Goff,* Prosecuting Attorney, for the people.

LONG, J. Respondent was complained against in justice's court for keeping his saloon, in the city of Sault Ste. Marie, open after legal hours, on October 1, 1889. He waived examination, and the cause was returned to the circuit court for Chippewa county for trial. An information was filed against him, which did not allege that the defendant was not a druggist, or that the place kept open was not a drug-store. After a jury was impaneled to try the cause, the court permitted the prosecution to amend the information by stating that—

"He, the said Patrick J. Sullivan, not being then and there a druggist who sells liquors for chemical, mechanical, scientific, sacramental, or medicinal purposes only, and in strict compliance with law, and the said saloon not being then and there a drug-store," etc.

Respondent was convicted, and removed the cause to this Court, upon exceptions before sentence.

It is contended by respondent that the court was in error in allowing the amendment, for the reason that the information first filed stated no offense. The court properly allowed the amendment, if the amendment was at all necessary. The information, as amended, followed the form of the complaint made before the justice. It is not contended but that the complaint charged an offense, under the provisions of section 17, Act No. 313, Laws of 1887 (3 How. Stat. § 2283*e*). This offense stated in the com-

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plaint and warrant was the offense charged against him before the justice, and upon which he waived his examination.

It is contended that the first information did not allege any offense, and that therefore, the court having allowed an amendment which did charge an offense, the conviction was erroneous, for the reason that the defendant did not plead to the amended information. We are unable to agree with counsel for the respondent in their contention that the first information was defective. The question is fully settled in *People v. Robbins*, 70 Mich. 132. It was there said that—

"It is not necessary, in a complaint against a person for keeping a saloon open contrary to the statute, to state that such person is not a druggist. The name in such case distinguishes the place, and it is a violation of the law to keep a saloon open on week-days after nine o'clock, whether any liquor is sold therein or not."

We find no error in the record, and the court below is advised to proceed to judgment on the verdict.

The other Justices concurred.

CHARLES BATEMAN v. CHARLES A. BLAISDELL AND AMANDA BLAISDELL.

[See 81 Mich. 227.]

Practice in circuit court—Findings of fact—Chattel mortgage—Payment—Usury.

1. Error cannot be assigned upon the action of the trial judge in permitting the attorney for the prevailing party to prepare a draft of proposed findings of fact in the case.

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2. It is the province of the circuit judge, sitting as a trial court, to find all the facts which the testimony in the case *tends* to prove, and all inferences of fact which are or may be drawn from the testimony must be drawn by the trial court; and the appellate court cannot draw any inferences from the testimony contrary to the facts found by the court below; citing *Mills v. Van Camp*, 41 Mich. 645; *Treasurer v. Bunbury*, 45 Id. 79; *Butts v. Davis*, 50 Id. 310; *Edwards v. Nelson*, 51 Id. 121; *Neumann v. Mining Co.*, 57 Id. 97.

3. Plaintiff loaned defendants $56, taking as security a chattel mortgage on a piano and certain household goods payable in 30 days, without interest, and calling for $60. He retained $1 for drawing the mortgage, and $3 for advance interest for one month. After the defendants had paid $33 in equal monthly payments, which were receipted for as interest in full up to the end of the succeeding month, they made a further loan of $20, and gave a new mortgage in the name of a clerk in plaintiff's office, for $84, payable in 30 days, and the first mortgage was discharged. This was done without any settlement being had between the parties. The second mortgage was subsequently assigned to plaintiff. After defendants had paid $40 on the second mortgage in monthly payments, which were receipted for as interest, and which receipts provided for monthly extensions, the defendants refused to make any further payments, and tendered the balance they claimed to be due on the mortgage, which tender was refused, and plaintiff replevied the property. The case was tried before the circuit judge without a jury, who found the foregoing facts, and that the giving of the mortgages was virtually one transaction, there being no settlement, and that the payments made, with the sum tendered, were sufficient to discharge the mortgage lien, and rendered judgment for the defendants, which is affirmed.

Error to Kent. (Grove, J.) Submitted on briefs November 14, 1890. Decided November 21, 1890.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Maher & Felker, for appellant, contended:

1. The case presented is the ordinary one of people who are unable to borrow money in such a way as to give adequate security for its repayment, and have resorted to one who was willing

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to loan in small sums, in consideration of his being paid a bonus over legal rates of interest for extra trouble and risk. The arrangement, which was originally made for a single month, was allowed to run upon the same terms for a year, and seems to have been entirely satisfactory to the defendants. At the end of the year they desired an additional loan, the note and mortgage were surrendered to them, and new securities were made to cover the amount of the principal of the old loan, the amount of the additional loan and interest, and bonus for one month, at the expiration of which time the debt was to be due. This was extended from month to month, upon the payment of monthly bonuses as interest, until February 13, 1889, a period of eight months and thirteen days after the month for which interest was covered by the mortgage. These are the facts in the case as they should have been found, and no amount of quibbling or evasion can change their substantial character and effect. This Court has ruled upon the question presented in several cases, and the decision of the circuit judge is in direct conflict with those rulings; citing *Craig v. Butler*, 9 Mich. 21; *Smith v. Stoddard*, 10 Id. 148; *Gardner v. Matteson*, 38 Id. 200; *Near v. Lowe*, 56 Id. 632; *Dykes v. Wyman*, 67 Id. 237.

Frank G. Holmes, for defendants, contended for the doctrine stated in the opinion.

CHAMPLIN, C. J. This action is replevin, under which the plaintiff seized a piano and certain household goods claimed in the declaration to be of the value of $300. The case was tried before the court without a jury, and findings of fact and law made upon request of the parties. The record states that after the request was filed, and after the trial, the circuit judge directed defendants' attorney to prepare a draft of the findings, which he did, and the same were signed by the judge on October 10, 1889. Said findings were afterwards amended, and the amended and completed findings were filed on January 20, 1890.

The plaintiff, by his attorney, has assigned error upon the action of the court in permitting defendants' attorney to prepare the findings of fact in the case. Error cannot

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be assigned upon such action of the court. It raises no question of law in the case. As a matter of practice, we discover no impropriety, after a circuit judge has determined in his own mind how he will decide a case tried before him without a jury, to request the attorney for the prevailing party to prepare and present to him a statement of the facts as shown by the evidence. Such statement is not obligatory upon the court, the opposite party is entitled to propose amendments, and the facts are finally settled by the court. There is no way in which such practice can prejudice the opposite party. The finding of facts is a judicial act, and so is the finding of a decree. But a decree is usually drawn by the solicitor of the prevailing party, and it becomes the judicial act of the court when it is signed by the judge; and so the findings of fact prepared by the attorney become the judicial act of the court when they are signed by the judge. They are prepared for the convenience, assistance, and consideration of the court, and there would be no impropriety in requesting the attorneys of the respective parties to prepare a statement of facts for the consideration of the court, and he could derive such assistance as he could from either or both statements.

The amended findings of the court were that,—

"In the spring of 1887, the parties were residents of the city of Grand Rapids. The defendants called upon, and obtained a loan of money from, the plaintiff, upon a chattel mortgage. The mortgage was executed for sixty dollars, payable in thirty days from date, without interest. Said mortgage covered the property described in the writ of replevin and plaintiff's declaration in this cause. Said mortgage was made and dated April 1, 1887. That, upon the execution and delivery of this mortgage, the plaintiff paid to defendants fifty-six dollars, retaining one dollar for drawing the mortgage, and three dollars advanced interest for the first month's interest; that after that, and up to the first day of April, 1888, they paid on

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this mortgage thirty-three dollars, in monthly payments of three dollars each, for which plaintiff gave them receipts, in the words and figures following, viz.: [it is not necessary that more than one receipt should be included in this opinion as they were all substantially alike:]

"'GRAND RAPIDS, May 13, 1887.

"'Received of Chas. Blaisdell interest in full up to June 13, '87.

"'CHAS. BATEMAN.'"

"That on the second day of April, 1888, the defendants borrowed of the plaintiff a further sum of twenty dollars, and the plaintiff requested a new mortgage to be given in the name of Arabella Miller, a clerk in his office, from whom he stated he had borrowed money. This mortgage was drawn by the plaintiff for eighty-four dollars, payable in thirty days, and the former mortgage was discharged. That there was no settlement between the parties when this second mortgage was executed and the first mortgage discharged."

A copy of the mortgage is appended to the findings as an exhibit. It acknowledges a debt of $84, and recites that the mortgage is given to secure the payment of the debt and interest. It is conditioned to pay Arabella Miller $84 according to the condition of a promissory note of even date.

The circuit judge further finds—

"That after the execution of the second mortgage, and on the 13th day of April, the defendants paid to the plaintiff on the same four dollars, and four dollars each consecutive month thereafter for nine months, making a total of forty dollars paid on such second mortgage, for which plaintiff gave receipts."

These receipts are of the same tenor as those above referred to, being for interest on the note and mortgage, and containing monthly extensions. Some of these receipts are signed, "Arabella Miller," and some "A. Miller, per Bateman." The December, 1888, receipt is signed, "Chas. Bateman."

The court finds further—

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"That on the 3d day of December, 1888, the plaintiff took this mortgage by assignment from Arabella Miller, and held the same at the commencement of this suit; that on the 27th day of February, 1889, the plaintiff called at the dwelling-house of the defendants, where the mortgaged property then was, and demanded of Amanda Blaisdell, one of the defendants, payment of the interest on the mortgage for the month of February in payment of the mortgage debt, or that the mortgaged property be delivered to him, and was told by the defendant Amanda Blaisdell that the defendants would not pay any more on the mortgage, and would not give up the property. She told him at the same time to go and see her husband, Charles Blaisdell, about it, which he declared to her he would not do, and did not do, and made no other or further demands before suit. Defendants afterwards, and on the same day, caused a tender of ten dollars to be made to the plaintiff to cover any amount that might be due on said second mortgage. And the plaintiff refused such tender, and on the following day took out the writ of replevin in this cause.

"I find the consideration of the second mortgage to be the amount remaining unpaid on the first mortgage and legal interest thereon, and twenty dollars paid by the plaintiff to the defendants at the date of the second mortgage; and that the two mortgages were one continuous contract between the plaintiff and defendants, upon which there was no settlement from the date of the first mortgage; and that the plaintiff had no other claim or interest in the property named in the writ.

"I find that the defendants paid on said mortgages all that the plaintiff loaned to them, and interest, and that at the commencement of this suit the plaintiff had no valid lien upon the property named in the writ of replevin in this cause, and was not entitled to the possession of the same."

From the foregoing facts, the court found the following conclusions of law:

"1. That there was no consideration for the said second mortgage in excess of the sum of twenty dollars, and the unpaid balance of the first mortgage.

"2. That there was nothing due on the debt secured by said second mortgage in excess of the amount of the

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tender made as aforesaid at the time of the commencement of this suit.

"3. That the said defendants are entitled to a judgment for the return of the property, and such damages as they have sustained for their unlawful detention, with costs to be taxed."

The counsel for plaintiff requested the circuit judge to amend his findings—

"By inserting a statement therein that the payments made on the mortgage of April 1, 1887, referred to in said findings, were made as interest at the rate of three dollars per month on the amount of said note and mortgage.

"By striking out the statement 'that there was no settlement between the parties when the second mortgage was executed and the first mortgage discharged.'

"By inserting therein that Arabella Miller paid the plaintiff the amount of the first mortgage, being sixty dollars, and furnished the twenty dollars loaned the defendants on the second mortgage, when the first mortgage was discharged.

"By inserting that the plaintiff allowed said Arabella Miller eighty-four dollars in his dealings with her, for the assignment to him of the mortgage and note of April 2, 1888.

"By striking out, 'and that the second mortgage was one continuous contract between the plaintiff and defendants, upon which there was no settlement from the date of the first mortgage.'"

All the proffered amendments were refused, to which refusals of the circuit judge exception was duly taken. Counsel also filed exceptions to the matters of law embodied in said findings.

As to the exceptions to the facts found, including requests of plaintiff's counsel to amend the findings, we remark that, although the bill of exceptions states that all the testimony is substantially contained therein, yet it is the province of the circuit judge, sitting as a trial court, to find all the facts which the testimony in the case tends to prove; and all inferences of fact which are or may be drawn from the testimony must be drawn by

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the trial court. This Court can draw no inferences from the testimony contrary to the facts found by the court below. *Neumann v. Mining Co.*, 57 Mich. 97; *Mills v. Van Camp*, 41 Id. 645; *Edwards v. Nelson*, 51 Id. 121; *Butts v. Davis*, 50 Id. 310; *Treasurer v. Bunbury*, 45 Id. 79.

The judgment in this case is based upon the facts found that the monthly payments were not in the nature of illegal interests, but were made from time to time to apply upon the indebtedness due from defendants to the plaintiff, and upon the further facts that the plaintiff was at all times the real owner of the note and mortgage, and the making of the last note and mortgage to Arabella Miller was only colorable, and for the purposes of the plaintiff.

There was testimony in the case which would have warranted a finding of fact that the plaintiff was exacting from the defendants interest at the rate of 60 per cent. per annum, and was requiring the payment thereof monthly out of the earnings of a day-laborer, whose straightened circumstances compelled him to borrow $60, and afterwards a further sum of $20. But there was nothing upon the face of the note and mortgage, or in any other papers, showing that the loan was for anything other than legal interest. The mortgage is on condition that the sum be paid with interest, and none of the receipts mention the amount received, but are simply acknowledgments of the receipts of interest. The court was authorized to draw references from the whole testimony, and the circumstances attending the transaction, that these repeated monthly payments were made to be applied upon the principal, as well as legal interest; and we cannot say that such inferences were unwarrantable, and without some testimony to stand upon. *Bateman v. Blake*, 81 Mich. 227. Certain it is that, if such inference could be drawn from the testimony, justice

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and humanity require that they should be drawn under the testimony disclosed in this case.

We think also that the circuit judge was authorized, from the testimony, in his conclusions that there was no settlement between the parties, and that it was all one continuous transaction. The testimony of the plaintiff was not conclusive upon these points. The credibility of the witnesses was exclusively for the judge. The other testimony showing the manner in which the business was conducted, the relations between plaintiff and his clerk, the assignment to him, was proper to be considered and weighed by the trial judge. From all the testimony, he has found that it was one transaction, and there had been no settlement. The circuit judge has found that these sums were payments upon the debt, and that, taken together with the amount tendered, they were sufficient to discharge the lien of the mortgage.

We discover no error in the record, and the judgment must be affirmed.

The other Justices concurred.

WILLIAM J. GRAY, TRUSTEE, ETC., v. THE FEDERAL BANK OF CANADA ET AL.

Mortgage—Foreclosure—Decree—Time of sale.

A foreclosure bill was amended by adding new parties, and was again amended by correcting the name of one of the added parties by changing his sirname from Hamlin to Hammond, his real name. And it is held that a sale could not be decreed until one year after the filing of the last amendment, by which

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Hammond was made a party defendant; citing *Canfield v. Shear*, 49 Mich. 313; *Burt v. Thomas*, Id. 462.

Appeal from Wayne. (Reilly, J.) Submitted on briefs November 14, 1890. Decided November 21, 1890.

Bill to foreclose a mortgage. Defendants Federal Bank of Canada and Herbert C. Hammond appeal from final decree entered June 18, 1890, authorizing foreclosure sale at any time after November 11, 1890. Decree modified so as to allow a sale after the expiration of one year from the filing of the last amendment to the bill, by which Hammond was made a party. The facts are stated in the opinion.

Robert T. Gray, for complainant.

S. S. Babcock, for appellants.

Dickinson, Thurber & Stevenson, for defendant Snyder.

Bowen, Douglas & Whiting, for defendants Whyte and McMahen.

PER CURIAM. A bill to foreclose a mortgage was filed November 11, 1889. Afterwards, and on December 13, 1889, the bill was amended by adding new parties. Again, on April 15, 1890, the bill was amended, so as to correct a name of a party defendant, by changing the name from Hamlin to Hammond. A final decree was entered on June 18, 1890, which authorized a foreclosure sale at any time after November 11, 1890. The Federal Bank of Canada and Herbert C. Hammond, who were made parties as subsequent incumbrancers, appeal, and insist that the decree is erroneous, in that it authorizes a sale in less than a year from the filing of the amended bill. How. Stat. § 6701.

The decree must be so modified as to authorize a

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sale after the expiration of the year from the filing of the last amendment, by which Hammond was made a party. *Canfield v. Shear*, 49 Mich. 313; *Burt v. Thomas*, Id. 462. A decree will be entered authorizing a sale after April 15, 1891, and the record remanded to the circuit court in chancery for the execution of the decree.

As the appeal was made in the interest of complainant as well as of appellants, who hold as tenants, no costs will be allowed to either party in this Court.

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JOHN COLL v. THE CITY BOARD OF CANVASSERS OF ELECTION, AND A. G. KRONBERG, CITY CLERK, OF THE CITY OF DETROIT; HENRY SCHEHR v. SAME; AND JACOB F. MEIER v. SAME.

[Three cases.]

Election—Board of canvassers—Mandamus.

The duty of the city board of canvassers of election of Detroit is *purely clerical*,—to foot up the returns of the boards of inspectors, and declare the result, and issue certificates accordingly,—and the performance of this duty will be compelled by *mandamus*.

Mandamus. Argued November 18, 1890. Granted November 19, and opinion filed November 21, 1890.

Applications for *mandamus* to compel respondent board to declare relators elected to the office of alderman of their respective wards. The facts are stated in the opinion.

Wisner, Speed & Harvey, for relators.

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F. A. Baker, for respondent Jacob.

George H. Prentis, respondent, in *pro. per.*

GRANT, J. Each of the above relators has applied to this Court, by petition, for the writ of *mandamus* to compel the respondent the board of city canvassers to assemble and declare him elected to the office of alderman.

Relator Coll was elected to fill a vacancy in the 16th ward of the city by a majority of 19 votes. Relator Schehr was elected by a majority of 45 votes; relator Meier by a majority of 39 votes. The boards of inspectors of election of the several precincts returned the number of votes cast for each candidate for alderman in the respective wards. These returns were duly filed, and the city board of canvassers of election met on the 8th of November to canvass the returns. They adjourned until November 10, without action. On November 10 the returns from said boards of inspectors were referred to a committee to foot up the returns for the respective persons voted for in the respective districts. This committee reported showing the above majorities for the relators respectively. The respondents refused to declare any result in the case of relator Coll. In the case of the other relators, their opponents, who received the minority of the votes cast, were, by a majority vote of the respondents, declared elected, and the petitions aver that it is the intention of the city clerk, respondent Kronberg, to issue certificates of election to their opponents. After the above action the board adjourned *sine die*.

Respondent Prentis answers denying that he acted with the majority, though the clerk records him as having voted with them. He has therefore purged himself from complicity with this infamous transaction. Of the other respondents, Jacob alone answers, admitting all the facts set up in the petition, and setting forth in detail what

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transpired before the board of canvassers. No protest was made against the election of Coll, nor was there any pretense that he was not fairly and honestly elected.

In the case of relator Schehr, his opponent, Henry Gudeneau, filed a protest in which he claims that votes were illegally, unlawfully, and fraudulently cast for said Schehr by the unlawful use of money by said Schehr and his agents. In support of this protest he filed two affidavits, one by one Nickolas C. Youngblood, who swore that while he was talking to a voter on election day, who expressed a desire to vote for Gudeneau and had accepted a ticket from the deponent, and while said deponent and said voter were engaged in conversation, relator Schehr interfered and requested said voter to step aside with him; that they stepped aside, and that the deponent saw Schehr give to the voter some money. Youngblood heard none of the conversation, and does not even swear that the man, whose name he does not give, voted. The other affidavit was made by one John Fishcher, who swore that one Ruoff asked a voter under similar circumstances to step aside with him. He does not claim to have heard what was said, but he avers that Ruoff gave the voter one dollar, and he believes that it was given for and in behalf of relator Schehr, and accepted by the voter, whose name he does not give, as an inducement to vote for Schehr. This affidavit likewise does not state that the man voted.

A protest was filed by John Kessler, opposing candidate in the election against Meier, charging that he corruptly gave money to diverse and sundry persons, whose names were unknown to him, and who voted at the election, and that by reason thereof said Meier obtained his majority. His protest is sworn to, and is stated to be only upon information and belief. This protest was sup-

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ported by the affidavits of two boys, one 15 and the other 14 years old. One swore that he saw two men dressed like working men, each having a dinner basket, standing upon the sidewalk about 8 or 10 feet distant from the place where his comrade and himself were standing, and about 40 or 50 feet from the entrance to the polling place; that two men approached them and commenced talking with them; that, after a short conversation, one of these men called relator Meier to them. Meier approached and gave each of the two men who carried dinner baskets some money. Neither of the boys heard what was said, and neither swore that either of the men voted.

Without any investigation or attempt to ascertain the truth of these charges, the respondents, composing the board of canvassers, by a vote of 34 to 20, declared the opponents of relators Meier and Schehr elected. It thus appears that the majority of the respondents, whose duty is purely clerical,—to foot up the returns of the boards of inspectors, and declare the result, and issue certificates accordingly,—turned the canvassing board into a pretended court for the purpose of trying a question of fraud, and then determined it without swearing a witness, without any investigation, without any proof before them to substantiate the charges made, and, in short, without even the form or pretense of law or right.

Respondent Jacob says in his answer:

"This respondent, believing that said Henry Gudeneau and John Kessler were legally elected, in introducing a resolution declaring the result of the canvass of aldermen, included their names as aldermen elected from the 7th ward and from the 13th ward."

He further returns that he has submitted the above proceedings to an attorney at law, by whom he is advised that said board had no authority to take the action they did, and that it was their official duty to canvass and

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declare the relators elected, which he says that he and the other respondents are now ready to do, when the time for so doing is fixed by this Court.

This conduct on the part of a majority of the respondents finds not even a shadow of law or decency to support it. It was wholly wrong in law and in morals. The respondents did not require the advice of an attorney to inform them of their duty and of the illegality of their action. They do not pretend that they did not know their duty before taking advice of counsel, nor that, at the time, they believed their action justifiable. Such a statement, if true, would be an impeachment of their intelligence. They confess the turpitude of their conduct by making no attempt to excuse or justify it. Their action was a willful attack upon the rights and liberties of the people, and a most wicked attempt to defeat the will of the people as expressed by their votes.

The relator Coll was entitled to his certificate immediately upon the canvass of the votes, and to take his place as a member of the common council. By this action of the majority of the respondents the people of the 16th ward are without representation, and meanwhile meetings of the council are being held and important business transacted. If respondent Kronberg has issued certificates to Kessler and Gudeneau, such certificates are absolutely worthless and void. They cannot be made a basis for the assertion of any right on their part. The relators are entitled to their certificates, and to the offices to which they were elected, until a better right thereto shall be established in some of the proceedings provided by law for that purpose, in which both parties can be heard.

Writs of *mandamus* will issue in each of the cases commanding the respondents to meet on Monday next, the 24th day of November, at 2 o'clock P. M., to canvass the

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returns, declare the result, and issue the certificates to the relators. Each of the relators is entitled to recover the costs of these proceedings against those who voted to deny them their rights. Each member of the canvassing board is made a party respondent to this proceeding. It would be a denial of justice to compel the relators to resort to the courts at their own expense for the recovery of their rights, in which not only they, but the public, are alike interested. The record shows who of the respondents are responsible for the action of the board, and they must pay the costs. This does not include respondent Prentis, who has denied all complicity with the transaction.

The other Justices concurred.

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GEORGE H. DUNSTON v. THE HOPTONIC COMPANY (A CORPORATION) ET AL.

Corporations—Judgment creditors' bill—Parties—Part-paid stock.

A judgment creditors' bill was filed against a corporation and five of thirty-four stockholders, one of whom was not brought in by the service of subpœna or otherwise. The remaining stockholders were alleged to own 1,020 of the 12,000 shares of stock issued by the corporation, and were sought to be charged with all of the corporate debts that the corporate assets would not meet, on the ground that they purchased their stock at 25 cents on the dollar. The bill alleged on information and belief that many of the stockholders were minors, insolvent, or non-residents of the State, but no claim was made that *all* of those not joined as defendants fell within these classes. And it is held that such general allegation fails to show that all of the stockholders were made parties who should contribute to the payment of the corporate debts, and that the bill was properly

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dismissed as to the stockholder defendants for want of necessary parties, they having interposed such defense by way of demurrer.

Appeal from Kent. (Burch, J.) Argued October 8, 1890. Decided December 5, 1890.

Judgment creditors' bill against a corporation and a portion of the stockholders. Complainant appeals from decree dismissing the bill on demurrer. Decree affirmed as to stockholder defendants, and reversed as to corporation defendant, with leave to answer. The facts are stated in the opinion.

Sweet & Perkins (*Birney Hoyt*, of counsel), for complainant, contended:

1. The capital stock of a corporation is a trust fund for the benefit of its creditors; citing *Wood v. Dummer*, 3 Mason, 308; *Spear v. Grant*, 16 Mass. 9; *Vose v. Grant*, 15 Id. 517; *Sanger v. Upton*, 91 U. S. 56; *Hatch v. Dana*, 101 Id. 205; *County of Morgan v. Allen*, 103 Id. 498; *Sawyer v. Hoag*, 17 Wall. 620; *Hastings v. Drew*, 76 N. Y. 9; *Railway Co. v. Fitler*, 60 Penn. St. 124; *Bunn's Appeal*, 105 Id. 49; *Turnbull v. Lumber Co.*, 55 Mich. 387.
2. The obligations assumed by a corporation are nominally those of the corporate entity, not of its shareholders; but it is plain that the shareholders are the real parties in interest, which fact will be judicially recognized by compelling them to make good the security which parties dealing with the corporation are justly entitled to expect; citing 2 Mor. Priv. Corp. § 781; Cook, Stock, § 230; *Hightower v. Thornton*, 8 Ga. 486; *Holmes v. Sherwood*, 3 McCrary, 405; *Patterson v. Lynde*, 106 U. S. 519; *Ladd v. Cartwright*, 7 Or. 329; *Brown v. Fisk*, 23 Fed. Rep. 228.
3. The most usual remedy by creditors to obtain payment of their claims against the corporation in cases like the present is by bill in equity. The remedy is settled in this State, however, both by statute and the decisions of this Court under it; citing How. Stat. §§ 6614; 6615; *Turnbull v. Lumber Co.*, 55 Mich. 398; *Brewer v. Salt Association*, 58 Id. 351; *Young v. Iron Co.*, 65 Id. 111; and see *Pettibone v. McGraw*, 6 Id. 441; *Mining Co. v. Bagley*, 14 Id. 505.

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4. The bill is not one for winding up the corporation, but purely and simply a judgment creditors' bill, filed to reach certain assets of a corporation. It does not pray that the corporate affairs be wound up, and, besides, the method by which a corporation can be dissolved and wound up is expressly provided by statute; citing How. Stat. chaps. 281, 282; and a special proceeding for that purpose must be instituted; citing *People v. Bank*, 12 Mich. 527; *Railway Co. v. Circuit Judge*, 31 Id. 456; *Cook v. Railroad Co.*, 45 Id. 458; *Cady v. Manfg. Co*, 48 Id. 133; *Railroad Co. v. Johnson*, 49 Id. 148; *Tripp v. Plank-road Co.*, 66 Id. 1.

5. A corporation is not dissolved by the appointment of a receiver after the return of an execution unsatisfied, nor by voluntary liquidation (citing *Mann v. Pentz*, 3 N. Y. 415; *Osgood v. Maguire*, 61 Id. 524; *Bank v. Ins. Co.*, 104 U. S. 54; *Bank v. Bank*, 14 Wall. 383), nor by disposing of its corporate property, nor by a sale of its franchises under a decree of foreclosure or on execution, nor by an assignment, nor can its insolvency extinguish its legal existence; citing *Glass Manufactory v. Langdon*, 24 Pick. 53; *Bruffett v. Railroad Co.*, 25 Ill. 353; *Swan v. Howard*, 3 Edw. Ch. 287; *Coburn v Manfg. Co.*, 10 Gray, 245; *State v. Rives*, 5 Ired. 309; *De Camp v. Alward*, 52 Ind. 473; nor is it dissolved by cessation of active business, nor by a neglect to hold annual meetings for ten years, nor by ceasing to exercise corporate powers; citing *Hotel Co. v. Sauer*, 65 Mo. 288; *Bank v. Robidoux*, 57 Id. 446; *Rorke v. Thomas*, 56 N. Y. 563; *State v. Barron*, 58 N. H. 370; *Rollins v. Clay*, 33 Me. 132; nor does a corporation lose its corporate capacity merely by a perversion or abuse of its powers, nor by an omission to elect officers, nor by a sequestration of its property; citing *Clancey v. Manfg. Co.*, 62 Barb. 395; *Allen v. Railroad Co.*, 49 How. Pr. 14; *Com. v. Cullen*, 13 Penn. St. 133; *Evarts v. Manfg. Co.*, 20 Conn. 447; *Harris v. Railroad Co.*, 51 Miss. 602; *Cahill v. Ins. Co.*, 2 Doug. 140; nor will it be dissolved by being enjoined from exercising its corporate powers, nor by a lease and transfer of its whole road, nor because its stockholders and directors may consider it defunct; citing *Kincade v. Dwinelle*, 59 N. Y. 548; *Rollins v. Clay*, 33 Me. 132; *Railway Co. v. Fitier*, 60 Penn. St. 132; *Rosenblatt v. Johnston*, 104 U. S. 463.

6. The defendants are not *bona fide* purchasers of the stock held by them. There are some cases holding that innocent purchasers of stock in the open market, without notice, knowledge, or means of knowledge that the stock they purchase is not fully paid up, are not liable for the unpaid balance; citing *Foreman v. Bigelow*, 4 Clif. 508; *Steacy v. Railroad Co.*, 5

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Dill. 348, 376; *Young v. Iron Co.*, 65 Mich. 125; but in those cases it is stated or intimated that this doctrine does not apply when the purchaser has notice or means of knowing that the stock is not fully paid; and the defendants are within this exception.

7. The acceptance of a part-paid certificate *ipso facto* obligates the holder to make up its par value, if the duty of the corporation to its creditors requires it; citing *McKim v. Glenn*, 66 Md. 479; *Glenn v. Scott*, 28 Fed. Rep. 804; *Flinn v. Bagley*, 7 Id. 785; *Holmes v. Sherwood*, 3 McCrary, 405; *Jackson v. Traer*, 64 Iowa, 469; *Lee v. Imbrie*, 13 Or. 510; and any secret arrangement between the corporation and its stockholders by which the responsibility of the latter is made less than it appears to be is void as against creditors; citing *Thompson v. Bank*, 19 Nev. 103; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, Id. 65; *Upton v. Hansbrough*, 3 Biss. 417; *Hawley v. Upton*, 102 U. S. 316.

8. It has been established in this State that in proceedings of this kind it is not necessary to make all of the stockholders defendants; citing *Pettibone v. McGraw*, 6 Mich. 441; and the same doctrine is supported by the following cases: *Wood v. Dummer*, 3 Mason, 308; *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Construction Co.*, 33 Wis. 253; *Marsh v. Burroughs*, 1 Woods, 468; *Ogilvie v. Ins. Co.*, 22 How. 380; *Holmes v. Sherwood*, 3 McCrary, 405; *Hatch v. Dana*, 101 U. S. 210; *Brundage v. Mining Co.*, 12 Or. 328; *Glenn v. Williams*, 60 Md. 116; *Vanderwerken v. Glenn*, 85 Va. 9; *Cornell's Appeal*, 114 Penn. St. 153; *Tabor v. Goss*, 11 Col. 419; *Thompson v. Bank*, 19 Nev. 103; *Crawford v. Rohrer*, 59 Md. 599.

Butterfield & Keeney and *Blair, Kingsley & Kleinhans*, for defendants Spring, Talford, and Lucas, contended:

1. In support of claim that it is necessary to make parties defendant all *solvent* stockholders who are within the jurisdiction if practicable to do so, counsel cited *Adler v. Manfg. Co.*, 13 Wis. 57; *Coleman v. White*, 14 Id. 700; *Vick v. Lane*, 56 Miss. 681; *Mann v. Pentz*, 3 N. Y. 415; *Griffith v. Mangam*, 73 Id. 611; *Morgan v. Railroad Co.*, 10 Paige, 290, 294; *Wellington v. Construction Co.*, 5 N. Y. Supp. 587; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 Id. 371; *Umsted v. Buskirk*, 17 Ohio St. 113; *Bonewitz v. Bank*, 41 Id. 78; Thomp. Liab. Stockh. § 353; *Crease v. Babcock*, 10 Metc. 525; *Vose v. Grant*, 15 Mass. 505; *Jones v. Jarman*, 34 Ark. 339; *Matthews v. Albert*, 24 Md. 527; *Smith v. Huckabee*, 53 Ala. 191; *Erickson v. Nesmith*, 4 Allen, 236; *Wheeler v. Faurot*, 37 Ohio St. 26;

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Bullock v. Kilgour, 39 Id. 546; *Overmyer v. Cannon*, 82 Ind. 459; *Brewer v. Salt Association*, 58 Mich. 351.

Uhl & Crane, for defendant Swensberg, contended:

1. As the statute evidently contemplates that the assets of the corporation and its total indebtedness must be brought into the account in a case like this, all of the stockholders must be made parties.
2. A strong statement of the reasons why all the stockholders should be made parties in order to ascertain the assets of the corporation is found in *Wetherbee v. Baker*, 35 N. J. Eq. 501, although the case itself does not decide this point.

LONG, J. The bill was filed in this cause as a judgment creditors' bill April 24, 1889, and on the same day subpœna to appear and answer was duly issued directed to said defendants, returnable May 22, 1889. Subpœna was personally served upon all the defendants except John S. Long, who could not be found, as appears from the return of the sheriff on file in the cause. The cause was heard in the court below upon bill of complaint and demurrers, and the demurrers were sustained. Complainant appeals.

The bill alleges, substantially, that complainant obtained two judgments against the Hoptonic Company, upon which executions were issued and returned unsatisfied, and that such judgments remain in full force and effect and unpaid. It is further alleged that the Hoptonic Company has equitable interests, things in action, and other property, of the value of upwards of $100, exclusive of all prior claims thereon, which the complainant has not been able to discover and reach by execution. Other allegations are contained in the bill, usual to judgment creditors' bills.

Paragraph 6 of the bill alleges that the Hoptonic Company was organized as a corporation on or about April 8, 1885, under an act of the Legislature of Michigan entitled "An act for the incorporation of manufacturing

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companies," approved May 1, 1875, and the acts amendatory thereto. The articles of association were filed in April, 1885, in the office of the clerk of Kent county, and in the office of the Secretary of State. The purpose of the corporation was to engage in carrying on the manufacture of Hoptonic, a medicinal preparation, either as a medicine or medical beverage, under and by virtue of a certain trade-mark of the United States; the amount of the capital stock to be $300,000, divided into 12,000 shares, of $25 each. The property, stock, affairs, and business were to be managed by five directors; the office and business place of the corporation to be at Grand Rapids, Kent county, Mich.; the board of directors to choose annually a president, vice-president, secretary, and treasurer; the corporation to continue in business for 30 years. The original subscribers to the articles of association, as set out in the bill, were: Walter S. Hicks, Ann Arbor, Mich., 4,000 shares; John S. Long, Grand Rapids, Mich., 6,399 shares; Charles F. Cobb, Grand Rapids, Mich., 1 share; David F. True, Chicago, Ill., 1,200 shares; Ammi H. Pike, Chicago, Ill., 400 shares. It is alleged that the company, from the date of its organization down to October, 1886, carried on its business upon an extensive scale, and procured from complainant, and from various other parties, advertising materials in large quantities; that on or about October 7, 1886, said company gave a chattel mortgage upon all its personal property of every description running to Julius Houseman, as trustee for the Fourth National Bank of Grand Rapids, John S. Long, one of the defendants, and Spring & Co., a firm of which said Henry Spring is a member, securing the payment of $16,221.45 in the aggregate; that the value of such personal property is little, if any, greater than the amount of such mortgage; that said corporation is insolv-

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ent, and has ceased carrying on its said business, or any business whatever, except in a small way.

The bill further alleges that—

"On or about the 12th day of January, 1886, said corporation filed its annual statement, as required by law, in and by which it appeared that the capital stock of said company was $300,000; that the amount of capital stock actually paid in on the 31st day of December, 1885, was $13,562.50, and it owned personal estate, not including the value of its trade-mark, formulæ, and for sign patents, to the amount of $17,493.21; that the amount of credits of the said corporation was $2,748.50, and the amount of debts of the said corporation was $6,210.03; that there were at that time 34 stockholders, many of whom, your orator is informed and believes, were minors, insolvent, or non-residents of the State of Michigan: that in and by said report, it appears that said defendant John S. Long was the owner of 3,200 shares of the stock of said corporation; that said defendant Conrad G. Swensberg was the owner of 400 shares of the said stock; that said defendant Henry Spring was the owner of 400 shares of the said stock; that said defendant William D. Talford was the owner of 160 shares of said stock; that said defendant Thomas J. Lucas was the owner of 60 shares of said stock.

"That said defendant corporation did not file any annual report of its condition for the year 1886, nor any report since its organization, other than the one mentioned as filed on January 12, 1886; that your orator is informed and believes that the said defendants John S. Long, Conrad G. Swensberg, Henry Spring, William D. Talford, and Thomas J. Lucas have, since the date of said report, filed in January, 1886, purchased from the other stockholders in said corporation a large amount of the stock so held by them, and are now the owners of a larger amount of the stock of said corporation than was stated in said report, but the precise amount of the stock so owned by said defendants respectively your orator is unable to learn and cannot state.

"Your orator further shows on information and belief, and charges the fact to be, that said defendants John S. Long, Conrad G. Swensberg, Henry Spring, William D. Talford, and Thomas J. Lucas have not paid upwards of 25 cents on a dollar for said stock: that said stock was issued by said corporation to said defendants and the other stockholders in the usual way, and certificates issued to them respectively therefor by said corporation; that the same purported to be non-assessable and fully paid up; but that in fact no more than 25 per cent. of the par value of the stock had ever been paid by said defendants thereon.

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"Your orator is informed and believes that a few of the stockholders, other than those made defendants herein, paid 50 cents on the dollar for their stock in said corporation, but that none of them have ever paid the full par value of said stock, and that most of them have only paid 25 per cent. thereof.

"Your orator is informed and believes that the amount of capital actually paid in is only the sum of $13,562.50, the same as was stated in said annual report filed January 12, 1886; and your orator, upon information and belief, charges the fact to be that all of the stock of said corporation, amounting to 12,000 shares of $25 each, had been issued prior to the 12th day of January, 1886, by said corporation.

"Your orator further charges on information and belief that said defendant John S. Long is, and ever since the organization of said corporation has been, the president of said corporation; that said defendant William D. Talford is, and for a long time past has been, the treasurer of said corporation; and that said defendants Henry Spring and Conrad G. Swensberg are, and for a long time have been, the directors of said corporation.

"Your orator further shows that said defendants Long, Spring, Swensberg, and Talford have been generally known as wealthy and successful business men, and that their connection with said corporation, especially their prominent positions as officers and directors therein, have given greater credit to said corporation than it would otherwise have had; that your orator gave credit, and furnished advertising material, and performed labor for said corporation, and that he is informed and believes that other creditors have given credit to said corporation, because of the connection of said Long, Spring, Swensberg, and Talford with said corporation, and in the belief that the stock of said corporation was issued in good faith and represented actual capital paid into its business, and that, if not so actually paid in, the same would be forthcoming from said stockholders at any time when it should be needed. * * *

"Your orator avers on information and belief that said defendants John S. Long, Conrad G. Swensberg, Henry Spring, William D. Talford, and Thomas J. Lucas were fully cognizant of the condition of said company, and knew that the stock which they or some of them purchased from other stockholders had not been fully paid up. And he avers that the unpaid balance due on the stock as originally issued by said corporation to said defendants last named, as well as upon the stock so subsequently purchased by them, constitutes an equitable asset of said Hoptonic Company, which is liable to be, and should be, subjected to the payment of the debts of said corporation; that said balance constitutes a trust fund for the payment of creditors of said company; and that no pretended arrangement or agreement, by which said stock was or

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should be issued as paid-up stock on the payment of only part of its par value, is valid or binding as to your orator or the other creditors of said corporation.

"Your orator further shows on information and belief that the pretended claims of said defendants Long and Spring against said company are not *bona fide* claims against said corporation.

"Your orator files this, his bill of complaint, in behalf of himself and such other creditors of said Hoptonic Company as may make themselves parties to these proceedings. Your orator therefore prays—

"1. That the said defendants may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make all and singular the matters hereinbefore stated and charged, as fully and particularly, sentence by sentence, paragraph by paragraph, as if the same were here again repeated, and they thereto particularly interrogated, and that not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief; and that they may answer and set forth all the estate, real or personal, of every description, goods, chattels, money, book-accounts, due-bills, promissory notes, bonds, mortgages, judgments, and other choses in action, and each of them, belonging to the said Hoptonic Company, as well at the time of issuing said writs of *fieri facias* as at the time of filing this bill, whether standing in its name or in the hands of any other person or persons for its use, or in trust for it, either express or implied (except the trust hereinbefore mentioned), and what disposition has been made of each of the same, stating fully the amount, condition, situation, and value of each of them, the names and places of the residence of the debtors respectively, and the evidence of their indebtedness; and that they may set forth and state how much is due on each of such demands, and which of them are good and collectible, and which of them are doubtful, and which of them are uncollectible, and who has the possession, custody, or control of the said real and personal estate, goods, chattels, money, book-accounts, due-bills, promissory notes, bonds, mortgages, judgments, and other choses in action, and each of them.

"2. That a receiver of the money, property, things in action, and effects of the said defendant Hoptonic Company, with the usual powers and authority, may be appointed by this court; and that the said defendant Hoptonic Company may be directed to assign, transfer, and deliver, by its proper officers, upon oath, to said receiver, all its property, equitable interests, things in action, money, and effects, and all the books and papers relating thereto, and evidences thereof.

"3. That your orator may have satisfaction of the sums due to

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him on the judgments aforesaid against said company, together with his costs and charges in this behalf; and that all other creditors of said company who shall make themselves parties hereto may have satisfaction of their just claims against said company out of the said money, property, equitable interests, and things in action of the said Hoptonic Company.

"4. That the said Hoptonic Company and its attorneys, counselors, agents, and servants may be enjoined from collecting, interfering, meddling with, or disposing of any debts or demands due to it, or any real or personal estate, goods, chattels, wares, merchandise, account-books, bills, checks, promissory notes, bonds, mortgages, judgments, or other securities, things in action, property, or effects, whether in its own possession or in the names or hands of any other person or persons for its use or benefit, or in trust for it, express or implied, except where such trust has been created by, or the funds held in trust have proceeded from, some person other than the said Hoptonic Company, until the further order of this honorable court.

"5. That, in case the property of the said Hoptonic Company be insufficient to pay and discharge in full its debts to your orator, and its other creditors, the said defendants John S. Long, Conrad G. Swensberg, Henry Spring, William D. Talford, and Thomas J. Lucas be ordered and decreed severally to pay to the receiver in this cause, or to the register, or to a commissioner of this court, the amount remaining due and unpaid on the shares of stock so held and owned by them in the said Hoptonic Company; and that your orator and the other creditors of said company may have satisfaction in their claims out of the funds so created.

"6. That your orator may have such other and further relief in the premises as may be just and equitable."

All of the defendants, except Lucas, filed general demurrers. Defendant Lucas filed a special demurrer, and for causes of demurrer set out:

"1. That it appears by said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

"2. That it doth not appear by said bill that all the solvent stockholders of said Hoptonic Company who are within the jurisdiction of this court are made parties thereto.

"3. That it doth appear by said complainant's bill that there are stockholders in said Hoptonic Company other than those made parties to this suit, and it doth not appear from said bill that such

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stockholders are insolvent or beyond the jurisdiction of this court, nor doth it in any manner sufficiently appear therefrom why such other stockholders are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"4. That it doth appear by said complainant's bill that Walter S. Hicks and Charles F. Cobb, residents of the State of Michigan, and within the jurisdiction of this court, were stockholders of said Hoptonic Company, and it doth not in any manner sufficiently appear from said bill why the said Walter S. Hicks and Charles F. Cobb are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"5. That the said complainant hath not in and by his said bill made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant."

But two questions are argued here:

1. That the bill is defective for want of parties.
2. It is demurrable for want of equity.

The bill is filed as a judgment creditors' bill, after the return of execution unsatisfied, for the appointment of a receiver, and for other relief. It is sought, in case full relief is not otherwise had, to hold certain stockholders liable on the ground that the stock held by them is not fully paid. The bill is filed on behalf of the complainant, and such other creditors of the company as may make themselves parties to the proceedings. John S. Long is named in the bill as party defendant. He is alleged to be an original subscriber; but he was not served with process. Besides Mr. Long, only 4 out of the 34 stockholders of the company are made parties. The other defendants, Spring, Talford, Swensberg, and Lucas, are not subscribers to the capital stock, but, as the bill alleges, became purchasers of the stock after the company was incorporated. It is charged that Long, Spring, Swensberg, and Talford were successful business men, and their being interested in the corporation gave it greater credit, and that they purchased stock at 25 cents on the dollar. It appears from the bill that not one of

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the original subscribers to the capital stock is made a party defendant to the bill except Mr. Long, and he is not brought in. The parties who are brought in, it is claimed, own 1,020 shares out of the 12,000 shares, into which the stock of the corporation is divided, and it is sought by the bill to charge them with all the debts of the corporation that the assets of the corporation will not meet, and on the ground that they purchased their stock below its face value. There is an allegation in the bill upon information and belief that many of the stockholders are miñors, insolvent, or non-residents, of the State; but no claim is made that all those who are not made parties are either minors, insolvent, or non-residents of the State. Among the original subscribers to the capital stock, as appears by the bill, are Walter S. Hicks, of Ann Arbor, Mich., subscriber for 4,000 shares, and Charles F. Cobb, of Grand Rapids, Mich., subscriber for one share, and yet they are not made parties, and no showing is made but that they still retain their stock, are solvent, and reside within the jurisdiction. Under the state of facts it is insisted by defendants' counsel that it is necessary to make parties defendant all solvent stockholders who are within the jurisdiction if it is practicable to do so. The doctrine is stated in Thompson on Liability of Stockholders (section 353), as follows:

"The bill must be filed against all the shareholders, unless some valid excuse is shown for not bringing them in. This must necessarily be so, otherwise the main object of asserting the jurisdiction of equity, the equalizing of the burdens of shareholders, and the preventing of the multiplicity of suits, would be defeated. Under such a bill, an account will be taken of the debts and assets of the corporation, of the amount of capital not paid in, and the amount due from each shareholder."

Chief Justice Dixon, in *Adler v. Manufacturing Co.*, 13 Wis. 57, in a case where a bill was filed to enforce

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the liability of stockholders upon unpaid stock, said:

"The authorities show that in such actions, unless it be impossible or impracticable, all the stockholders must be made parties. This is required in order to enable the court to do complete justice between the stockholders themselves, and so that no one of them may be compelled to pay more than his due proportion, and that all alike may be obliged, according to the number of their respective shares and their pecuniary ability, to contribute toward the losses which the company may have sustained; for it would be manifestly wrong and unjust to allow the creditors to select one or more of the stockholders and compel them to submit to burdens from which the other shareholders, though equally bound, are exonerated. Hence, the shareholding defendants have the right, unless some good reason for the omission be shown, to insist on all the other shareholders being parties also."

This seems to be the rule as established by the great weight of authority, and I think it is the just, reasonable, and equitable one. Any other rule would permit the creditors of the corporation to select one or only a few of the stockholders within the jurisdiction, and compel payment by them of all the debts of the corporation, at least up to the unpaid balance of their subscription. and such subscribing stockholders, in order to compel the others to contribute, would be remitted again to the courts, thus leading to a multiplicity of suits.

In the case of *Young v. Iron Co.*, 65 Mich. 111, a creditors' bill was filed against a corporation and certain of its stockholders. The bill alleged that the corporation was insolvent, and sought to charge the stockholders with the unpaid balance upon the stock held by them. The cause was heard before Mr. Justice GRANT, then sitting in the Marquette circuit. Certain findings were made by him in framing the decree, and, on appeal to this Court, such findings were quoted in the opinion. The decree was reversed, yet no fault was found with the conclusions then

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stated upon that branch of the case. It was there said by him:

"It does not appear that there are any other like holders of stock of said corporation pecuniarily responsible within the jurisdiction of this court, but the question thereof will be referred to the commissioner under the order of reference herein made, and if it be discovered that there are other like holders of stock who are pecuniarily responsible for such decree as may be rendered against them herein, and who reside, or can be found, within the jurisdiction of this court, they shall be made parties defendant in this suit; but, if not, the said last-named defendants must share *pro rata*, according to the number of shares of stock held by each, in the payment of the said debts of said corporation."

This doctrine is fully recognized in New York. *Mann v. Pentz*, 3 N. Y. 415; *Morgan v. Railroad Co.*, 10 Paige, 290; *Griffith v. Mangam*, 73 N. Y. 611; *Wellington v. Construction Co.*, 5 N. Y. Supp. 587. The supreme court of New Hampshire also hold the same doctrine. *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 Id. 371.

It was an easy matter for the complainant to have ascertained who the stockholders were at the time of filing the bill, and whether they were within the jurisdiction. It is not pretended that any such effort was made, and the general allegation that some of the stockholders were insolvent, minors, and non-residents does not show that all were made parties who should contribute to the payment of the debts of the corporation. The demurrers must be sustained as to all the defendants except defendant corporation, on the ground that the bill cannot be maintained against such defendants for want of necessary parties.

A more difficult question is presented under the other cause of demurrer, but that question need not now be discussed or determined, and we shall not pass upon it

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as the bill is now framed. The court below very properly sustained the demurrers to the bill, on the ground of the want of necessary parties, and whether he was in error in sustaining the demurrer for want of equity in the bill we do not pass upon. The decree dismissing the bill as to all the parties except the corporation will be affirmed, with costs to such defendants.

But the bill was properly filed against the corporation, and will stand as a judgment creditors' bill as to it, and under which, upon proper proceedings, the complainant would have the right to the appointment of a receiver. The defendant corporation will be allowed 30 days in which to answer the bill.

CHAMPLIN, C. J., CAHILL and GRANT, JJ., concurred. MORSE, J., did not sit.

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THE INTERNATIONAL FAIR & EXPOSITION ASSOCIATION OF DETROIT v. HIRAM WALKER.

Corporations—Stock subscription—Liability of subscribers.

After the passage of Act No. 6, Laws of 1889, authorizing the incorporation of associations for exposition and exhibition purposes, the defendant became a subscriber to a preliminary subscription paper by which the signers agreed to subscribe for and take stock to the amount set opposite their names in a corporation, which the agreement stated they believed should be organized, with a capital stock of at least $250,000, for the purpose of purchasing suitable grounds and erecting suitable buildings thereon, upon a plan similar to the Buffalo Exposition, which subscriptions were not to be binding unless the sum of $100,000 was subscribed within sixty days from the date of the agreement, which condition had been complied with

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prior to the passage of said act. The corporation was duly organized with a capital stock of $500,000, of which over $250,000 was subscribed. The articles of association were not signed by the defendant, nor did he subscribe for any of the capital stock, except as before stated, but he attended a meeting called to select a site after such incorporation, and voted stock to the amount of his subscription. Grounds were purchased, and the corporation accepted the subscriptions, and tendered to the defendant stock to the amount of his subscription, which was refused, as also payment of the amount subscribed, and the corporation brought suit to recover the same, on the trial of which a verdict was directed for the defendant; and in reversing the judgment entered thereon it is held:

a—That the object sought to be accomplished by the preliminary agreement was a lawful one, and the promises therein contained mutual; that the acts done and moneys expended were in reliance upon the original subscriptions, and that there can be no difficulty in enforcing the agreement at the common law; and that the case falls so squarely within *Railway Co. v. Duncan*, 28 Mich. 180, as to render a discussion of the objection that the subscription paper is not a contract, and that it has no legal force or effect, unnecessary.

b—Knowing the amount of the capital stock called for by the articles of association, and the amount subscribed, defendant attended the meeting and voted his stock, as before stated, by which action he must be held to have assented to the articles of association increasing the amount of the capital stock; and, having acted with the other subscribers, upon the assumption that they intended to proceed with the stock partially subscribed, defendant cannot now be heard to say, as a defense to this action to recover for his subscription, that the amount of the capital as provided for in the articles of association is greater than contemplated in his subscription, or that it has not all been paid in; citing *Proprietors v. Chapin*, 6 Cush. 50.

c—The objection that, under the act, no action on a stock subscription can be sustained except for any deficiency that may exist after a sale of the stock in the manner prescribed by the act, is without force. The action is not brought to recover against a stockholder as such, but upon the agreement to pay the sum subscribed by the defendant to the use of the corporation thereafter to be organized, and for the purposes named in the contract. The other subscribers have paid, and the moneys have been expended. The corporation has been organized as provided in the preliminary subscription, and it has

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now become entitled to the money, and to maintain an action for its recovery upon the record as now presented.

Error to Wayne. (Hosmer, J.) Argued October 16, 1890. Decided December 5, 1890.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Marston, Cowles & Jerome, for appellant, contended:

1. *Railway Co. v. Duncan*, 28 Mich. 130, settles the law in this State in favor of the validity of such a preliminary agreement as is relied on in this case.
2. It is, of course, clear that this subscription, to be binding, must have been accepted; citing *Railroad Co. v. Eslow*, 40 Mich. 222; *Parker v. Railroad Co.*, 33 Id. 23; *Underwood v. Waldron*, 12 Id. 73; and recognition of the subscription by the corporation is sufficient; citing *Corwith v. Culver*, 69 Ill. 502; *Railroad Co. v. McCormick*, 10 Ind. 499; *Music Hall Co. v. Carey*, 116 Mass. 471; and allowing defendant to vote his stock at the meeting of March 18 was alone sufficient, as it recognized and accepted the relation in which defendant had placed himself.
3. The remedy given by the act, of selling the stock, is merely cumulative; citing *Carson v. Mining Co.*, 5 Mich. 288; *Railroad Co. v. Tipton*, 5 Ala. 787 (39 Am. Dec. 344); *Railroad Co. v. Dudley*, 14 N. Y. 336.

William Aikman (*F. A. Baker*, of counsel), for defendant, contended:

1. The preliminary subscription paper is not a contract, and it has no legal force or effect. It is very clear that the act does not provide for or in any way contemplate that there shall be any preliminary subscription book or papers, hence the case is not within *Railway Co. v. Duncan*, 28 Mich. 130, as the opinion in that case was based entirely upon the provisions of the general railroad law, which were held to contemplate a preliminary subscription. *Plank-road Co. v. Griffin*, 24 N. Y. 150, is conclusive of this or ony other case where the act does not contemplate a preliminary subscription list, and the subsequent decisions of this Court are in accord with the views of Mr. Justice CAMPBELL, as presented in his dissenting opinion in *Railway Co. v. Duncan*; citing *Parker v. Railroad Co.*, 33

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Mich. 23; *Railroad Co. v. Eslow*, 40 Id. 222; *Engine Co. v. Donovan*, 57 Id. 318; *Carmody v. Powers*, 60 Id. 26.

LONG, J. This is an action of *assumpsit* for a stock subscription.

The plaintiff is a corporation organized under the exposition and exhibition act of 1889, entitled—

"An act to provide for the incorporation of associations for the purpose of constructing, owning, controlling, and acquiring by lease, buildings for exposition and exhibition purposes." Laws of 1889, p. 6 (3 How. Stat. chap. 120*c*).

Before this act was passed, Messrs. Cottrell, Savage, and Goodfellow drew up and circulated the following subscription paper:

"For the purpose of purchasing suitable grounds, erecting suitable buildings thereon of a permanent character for fair and exposition purposes, to be upon a plan similar to the Buffalo Exposition, and believing that a corporation, with a capital stock of at least $250,000, should be organized for such purpose, the undersigned agree to subscribe for and take stock in such a corporation for such purposes to the amounts set opposite our respective names: *Provided*, that at least the sum of $100,000 shall be subscribed within sixty days from the date hereof, in order to render our agreement hereto binding.

"*Dated Detroit, January* 9, 1889."

About the time this subscription paper was started, it was considered desirable to secure legislation providing means for incorporating an association of the kind intended; and, in consequence of representations made to the Legislature, the act was passed which was approved February 13, 1889. It was by virtue of this act that the plaintiff received corporate existence. Subsequent to the passage of this act Mr. Walker (the defendant) subscribed his name to this paper for the amount of $5,000. Subscriptions to the amount of $100,000 were obtained on February 2, 1889, being within the 60 days mentioned in

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the subscription paper. A total of about $255,000 was subscribed. On February 25 a notice was sent to each of the subscribers, including Mr. Walker, and signed by the committee who procured the subscriptions, as follows:

"A meeting of the subscribers to the Exposition Association will be held at the office of Judge Marston, in the Whitney block, Tuesday, February 26, 1889, at 2 o'clock P. M., for the purpose of organizing. Your presence is requested."

Aside from this notice, Mr. Walker was personally notified by one of the committee, and, in conversation with him about the meeting for the purpose of organizing, requested that one of his sons be put on the board of directors, which was subsequently done. In pursuance of this call, a meeting was held, articles of association adopted, and a board of directors and officers of the association named, by a number of the subscribers, representing about $100,000 of the stock. At this time, about $220,000 had been subscribed. On March 9, 1889, the following notice was sent to all the other subscribers, as well as the defendant:

"The subscribers to the Detroit International Fair & Exposition Association are requested to meet with the board of directors at Library Hall, Merrill block (up one flight), on Monday, the 11 inst., at 8 o'clock P. M., for the purpose of determining upon a location."

This notice was signed by the vice-president and secretary of the association. The meeting was held, and adjourned for one week, and Mr. Walker, with other subscribers, notified of the adjournment. At this second meeting, Mr. Walker was present, addressed the meeting, made motions, and voted his own stock and that of his sons, who were also subscribers. The total number of shares voted at this meeting was 2,110, or $211,000. The board of directors made a call for the entire capital subscribed, amounting to over $255,000, and proceeded to

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acquire property and erect buildings at great expense, and held a fair and exposition upon a plan similar to the Buffalo Exposition. Mr. Walker never signed the articles of association, or subscribed for the stock; the only paper ever signed by him being the subscription paper first mentioned. Before the commencement of suit, stock was tendered to defendant by the company, and refused. On the trial in the Wayne circuit court, defendant introduced no evidence, and Mr. Walker was not called or examined as a witness. The court directed a verdict for the defendant. Plaintiff brings error.

The contention of defendant's counsel here is—

1. That the preliminary subscription paper is not a contract, and it has no legal force or effect.
2. That the articles of association provide for capital stock to the amount of $500,000, and, that amount not having been subscribed, the directors have no power to make calls.
3. That, under the act, no action on a stock subscription can be sustained except for any deficiency that may exist after a sale of the stock in the manner prescribed by the act.

It is contended by counsel for defendant, under their first proposition, that the act under which the corporation was organized does not provide for, or in any way contemplate that there shall be, any preliminary subscription; that the subscription paper itself is defective on each and every point required by the act to be set forth in the articles. It is not contended, however, but that the articles of association adopted conform to the statute, and that the plaintiff is duly and legally organized, but the contention is that Mr. Walker cannot be bound by the promise made in the preliminary subscription paper, to take and pay for the stock tendered by the corporation, because the act does not provide for such subscription, and that the defendant never signed the articles, or sub-

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scribed for the stock, and therefore never became a stockholder.

The object sought to be accomplished by this preliminary agreement was a lawful one; the promises contained in this preliminary agreement were mutual; and the acts done and moneys expended were in reliance upon these original subscriptions; and there could be no difficulty in enforcing this agreement at the common law. It is true that the name of the corporation to be organized was not set out in the agreement, but it was the purpose of the subscribers to organize a corporation similar to the Buffalo Exposition, and it was so organized. It was said in *Peninsular Ry. Co. v. Duncan*, 28 Mich. 139, that—

"Good faith to his associates, whose action his promise may be supposed to have influenced more or less, and who kept on their part the promise mutually made, requires that he should keep his also."

The agreement sets out fully the purposes and objects for which the moneys were to be raised. It was to purchase grounds, erect suitable permanent buildings thereon for fair and exposition purposes, and to be on a plan similar to the Buffalo Exposition. Two hundred and fifty thousand dollars, at least, was to be the amount of the capital stock, and the only limitation or condition under which the amount subscribed by each should not be paid was that $100,000 should be subscribed within 60 days. This amount was subscribed within the time. The other parties who subscribed went forward in good faith to carry out the plan named in the agreement, and in reliance that the defendant would pay in the amount of his subscription. He stood by and saw the moneys being expended, the ground purchased, and buildings erected. He attended a meeting, and voted, not only the stock of his two sons, but voted his own, upon the question of the site. This subscription was accepted by the plaintiff,

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and it has the power to give the stock subscribed for, and has offered to do so. I think this case falls so squarely within the case of *Peninsular Ry. Co. v. Duncan, supra*, that the first proposition of defendant's counsel needs no discussion. It is true that the statute under which the plaintiff in that case organized did require preliminary subscriptions, while the statute in the present case does not; but here, as in that case, the promises to pay the amount subscribed are mutual, and the agreement by the defendant to pay the $5,000 was relied upon by the other subscribers, and between them it was a valid contract, upon which, after organization, the corporation could maintain an action. If any question could arise as to the identity of the corporation organized as the one mentioned in the subscription paper, it must be held to have been waived by the defendant when he appeared at its meetings, and took part in the discussion of questions there raised, and voted his stock. The plaintiff was the person for whom the subscriptions were made, and had the undoubted right to bring the action.

Article 3 of the articles of association provides that the capital stock of the corporation is the sum of $500,000. It is therefore contended that, this amount not having been subscribed, the directors had no right to make calls. The argument is that, the whole amount not having been subscribed as contemplated by the articles of association, the interests of the subscribers might be materially affected. There would be great force in this contention if it were not for the fact that the original subscription paper which the defendant signed only contemplated that a corporation should be organized with a capital stock of $250,000, and his agreement was to pay the amount by him subscribed upon the sum of $100,000 being subscribed within the 60 days. More than the $250,000 was actually subscribed and paid in, and a call made upon him for

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the amount of his subscription. Knowing the amount of capital stock called for by the articles of association, and the amount subscribed, he attended the meeting and voted his stock, and it must be held that by such action he assented to the articles of association, increasing the amount of the capital stock; and, having acted with the other subscribers, upon the assumption that they intended to proceed with the stock partially taken up, he cannot now be heard to say, as a defense to this action to recover for such subscription, that the amount of the capital as provided for in the articles is greater than contemplated in his subscription, or that it has not all been paid in. This doctrine was recognized in *Proprietors v. Chapin*, 6 Cush. 50.

The third point—that, under the act, no action on a stock subscription can be sustained except for any deficiency that may exist after a sale of the stock in the manner prescribed by the act—has no force whatever. If is true that the doctrine contended for is laid down in some of the states, that the right to forfeit stock for non-payment of assessments does not imply a right in the corporation to sue for such assessments, while in some other of the states it is held that this remedy to forfeit the stock is merely cumulative, and an additional remedy, and does not take away the right to proceed in an action of *assumpsit* on the contract. Cook, Stock, § 124. But that is not the controlling question here. The action is not brought to recover against a stockholder as such, but upon the agreement to pay the sum of $5,000 to the use of the corporation thereafter to be organized, and for the purposes named in the contract. The other subscribers have paid, and the moneys have been expended. The corporation has been organized as provided in the preliminary subscription, and it has now become entitled to the money, and to bring and maintain an action for its

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recovery upon the record as now presented. The court below was in error in directing a verdict for the defendant.

The judgment of the court below must be reversed, with costs, and new trial ordered.

CHAMPLIN, C. J., and CAHILL, J., concurred. MORSE and GRANT, JJ., did nor sit.

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GEORGE LAMBERT AND MARGARET LAMBERT v. CHARLES WEBER, GERTRUDE WEBER, AND HARRY F. CHIPMAN.

Land contract—Specific performance—Tender—Bona fide purchaser—Notice.

1. Before concluding a purchase of real estate the vendee learned that third parties were in possession, as tenants, as claimed by the vendor, which information is held sufficient to put him upon inquiry, and to charge him with a knowledge of all of the facts which he might have learned by making such inquiry of the alleged tenants.
2. The making and depositing in *escrow* of the note of the vendee, to be delivered to the vendor when the vendee was given a good title to and possession of the land contracted for, is not such a payment of money as entitles the vendee to the rights of a *bona fide* purchaser for value.
3. A tender to the vendees in a land contract at their house in a distant part of a large city, late in the afternoon and after banking hours, of a deed of the land contracted for, coupled with a demand for the payment of the purchase price, amounting to a sum larger than the vendees could reasonably be supposed to have with them, and without giving them an opportunity to have the deed examined by their attorney, is not a proper tender of performance on the part of the vendors, and will count for nothing more than an express notice to the vendees that the vendors were insisting upon the acceptance of

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such title as they had (there having been a delay in closing the sale on account of an alleged defect in the title), and that the vendees were required to act promptly if they desired to insist upon a specific performance of the contract.

4. Defendants Weber contracted to sell complainants certain land for $3,500, of which $25 was paid down, and $3,475 was to be paid on the delivery of a deed conveying a good and clear title, and of an abstract of title, with tax statements, of the land. Complainants went into possession, soon after which the abstract was furnished, and, on its being submitted to an attorney, the parties were advised that it was necessary to procure a deed from certain heirs in order to perfect the title, and to this end negotiations were had with said heirs, but by reason of the excessive price asked by them the deed was not procured. The defendants finally insisted upon the acceptance of the title as it then stood, claiming that it was good, and that the alleged defect was only an apparent one, they and their grantors having held adverse possession of the land for thirty years, and tendered a warranty deed of the land and an abstract of title, and demanded payment, but not in such a manner as to forfeit complainants' right to a specific performance of the contract because of their refusal to comply with the demand. On the following day complainants offered to accept the title in its then condition, and make such payment, and specific performance is decreed in their favor.

Appeal from Wayne. (Reilly, J.) Argued October 16, 1890. Decided December 5, 1890.

Bill for specific performance of a land contract, and to set aside a subsequent conveyance of the land by defendants Weber to their co-defendant. Complainants appeal from a decree dismissing their bill. Decree reversed, and one entered in accordance with the prayer of the bill. The facts are stated in the opinion.

John Ward, for complainants.

William Look, for defendants Weber.

Harry F. Chipman, defendant, in *pro. per.*

CAHILL, J. Complainants filed their bill in the Wayne circuit court to compel the specific performance by defend-

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ants Weber of a contract made with them for the purchase of a piece of land in the city of Detroit, and also to set aside a subsequent conveyance of such land by the Webers to the defendant Chipman. The contract relied on reads as follows:

"$25.00 DETROIT, MICH., April 15, 1889.

"Received of George Lambert and Margaret Lambert, his wife, both of the city of Detroit, Wayne county, State of Michigan, the sum of twenty-five dollars, to apply on thirty-five hundred dollars purchase money, for which we hereby agree to sell and convey to them, of a good and clear title, all of the following described piece of land, situate on the east part of the east half of the south-west quarter of section twenty-one, in town one (1) south, of range twelve (12) east, in the county of Wayne and State of Michigan, containing nine and ninety-nine hundreths acres of land by actual measurement, bounded and described as follows, to wit: Beginning at a post in the north and south quarter line of said section, nineteen chains and sixty-five and a half links (19.65½) north from the south quarter post of said section, to which a swamp oak tree, ten inches in diameter, bears north, 41¾ degrees east, 83½ links distant; thence north on the quarter line aforesaid, ten chains, to a post; thence west along the south line of lot five of the subdivision of the estate of James Dunn, deceased, a distance of nine chains and ninety-eight and one-half links; thence south, parallel to the quarter line aforesaid, ten chains; thence east nine chains and 98½ links to beginning. The balance of thirty-four hundred and seventy-five dollars of said purchase money to be paid at the delivery of the deed and a Burton abstract of title, with tax statements, of said land. And we agree that said Lambert and wife may work the land from the date hereof in the mean time.

"Witness our hands and seals at the city of Detroit, county of Wayne, and State of Michigan, this twenty-second day of April, A. D. 1889.

"CHARLES WEBER.
"GERTRUDE WEBER.

"In presence of WM. STOLL."

When this contract was executed $25 was paid, and the complainants went into occupation of the land, planted

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crops, and cultivated and harvested them as they were ready, having uninterrupted and undisputed possession of the premises from thence on until the difficulty arose between them and the Webers in regard to the performance of the contract as hereinafter stated.

The abstract and tax statement required to be furnished were prepared and certified to May 9, 1889, and on May 11 the parties went to Mr. Stoll with a view to having the abstract examined and the sale closed. Stoll looked over the abstract, and told them there appeared to be a flaw in the title; that he thought it was necessary to procure a deed from the heirs of one Mrs. Marr. With this advice the parties left, with the understanding that the Webers should procure a quitclaim deed from the heirs of Mrs. Marr, and the business was postponed, for the time being, for that purpose. The Webers, within a day or two after, took the abstract to Judge Look, and placed their side of the case in his charge as their attorney. Soon after the Lamberts also called on Judge Look, and requested him to assist in obtaining the deed. Look told them he represented the Webers, and advised them to go to another attorney, which they did, employing John Ward, their present attorney. On the same day, Ward called on Judge Look, and asked for the privilege of examining the abstract. At the same time Ward said to Look that the Marr heirs came to him for advice, and that he could perhaps assist in obtaining the deed. For various reasons the quitclaim deed from the heirs of Mrs. Marr was not obtained. It appears that one of the heirs was a roving young man whose whereabouts were uncertain, and it would seem that he could not be found. The other heirs lived in Detroit, and although Mr. Ward, acting for the Lamberts, and Judge Look, acting for the Webers, each seem to have endeavored in good faith to procure a deed from them, nothing was accomplished.

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The Webers claim that these heirs at one time agreed to execute the deed for a nominal consideration, but that they afterwards changed their minds and demanded an unreasonable sum before they would do so. The Webers also claim that their title was good; that the defect pointed out by Mr. Stoll was apparent only; that they and their grantors had been in the actual, undisputed possession, of the premises for 30 years; and that their title by adverse possession was perfect. They claim that they, at various times, offered to perform this contract by executing a deed to the Lamberts, but that the latter, acting under advice of their counsel, refused to accept a deed unless a quitclaim should also be furnished from the Marr heirs.

Frequent negotiations were had between the parties and their counsel during the summer of 1887, which resulted in nothing definite. On September 18, 1889, Judge Look wrote to two of the heirs, demanding that they execute a deed which he had prepared and delivered to Mr. Ward for them to execute, and saying that if they declined to do so he should at once file a bill against them to quiet the Webers' title. It does not appear that anything came of this letter. Judge Look testified that he had repeated conversations with Mr. Ward at his office in regard to this transaction, in which he expressed the opinion that the title was all right, but also expressed a willingness to do what he could to obtain a quitclaim from the Marr heirs; that somewhere about September 1 he went with Mr. and Mrs. Weber to Mr. Ward's office, and informed Mr. Ward that the Webers were annoying him to such an extent that he was tired of it; that he had made every effort to get the deed from the Marrs, but that the Marrs wanted money, and would not sign unless they were paid.

"*Q.* You went to Mr. Ward because the matter was becoming monotonous?"

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"*A.* Yes, sir.

"*Q.* What had the Webers said?

"*A.* They said they wanted to convey the property and get their money.

"*Q.* Did you tell Mr. Ward that?

"*A.* I have told him that upwards of five times, myself.

"*Q.* What was it that occurred on the last day in Mr. Ward's office?

"*A.* That is the occasion about three weeks before the tender was make. I think it was the morning in the early part of the month of September, I requested Mr. and Mrs. Weber to go with me. * * * We went over to Mr. Ward's office and asked for the deed and the Burton abstract, and got it back, and Mr. and Mrs. Weber both said that they wanted to get rid of it. They said 'We cannot give any better title than we have got.' Mrs. Weber was very much excited.

"*Q.* What was the purpose of taking the Webers there that morning?

"*A.* I wanted to convince these people that we would do as was agreed, and I wanted them to be satisfied, and I stated to Mr. Ward that Mr. Weber had been there several times and wanted to get rid of this matter."

Mr. Ward, when examined as a witness for the complainants, admitted that Judge Look and the Webers called on him as stated, but denies that Judge Look told him that the title was good, or that the Webers then and there offered to execute a warranty deed, and told him that they were willing to convey such title as they had, and could not do any better. He says that Mrs. Weber turned back as she was leaving the office, and said to him, "The Lamberts shall never have that land."

On September 26, the defendants Weber executed a warranty deed to the Lamberts of the land, with full covenants, and late in the afternoon of that day, between 3 and 4 o'clock, defendant Charles Weber, accompanied by a justice of the peace and John Look, a brother of Judge Look, visited the Lamberts at their house, situated in a remote part of the city, where a tender was

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made of the warranty deed and the Burton abstract, and a demand made for the balance of the purchase money. John Look read the deed over to the Lamberts, and told them that they had come there to tender a performance of the contract on the part of the Webers and to demand the payment of the money; that if the Lamberts declined to accept the deed and pay the money he would pay them back $25 that had been paid down when the contract was made, and he tendered them that amount in gold. The testimony is conflicting as to what the Lamberts said in reply to this tender. The complainants testify that they said they wanted their attorney to look over the papers, and if they were right, that they should have the money; that they would hitch up at once and go and see their attorney; that their money was in the bank down in the city, and, if they could get it out, all right; that young Look said they need not do that, and it was arranged that they should meet at Look's office the next forenoon to transact the business. The defendants' witnesses, including the justice of the peace, John Look, and Charles Weber testified that the Lamberts said they would not take the deed nor would they take back the $25; that Lambert asked if they had got the deed from the Marrs, and said they would not take the title at all if the cloud was there.

Whatever the facts may be, this interview was not very important. It was not a proper tender of performance on the part of the Webers for them to visit the house of the Lamberts, in a distant part of the city, late in the afternoon, present a deed, and demand the payment of a large sum of money, without giving them an opportunity to have the deed examined by their attorney, and at a time after banking hours, when it was not reasonable to suppose they would have so large a sum of money with

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them. The transactions on the afternoon of September 26 can count for nothing more than an express notice to the Lamberts that the Webers were insisting upon an acceptance of such title as they had, and a payment of the money, and called upon the Lamberts to act promptly if they desired to insist upon a specific performance of the contract.

The evidence shows that on the next morning complainant George Lambert visited Judge Look's office. The testimony is conflicting as to what took place. Judge Look testified that he told Mr. Lambert that the deed and abstract were there ready to be delivered upon the payment of the money, and asked Lambert whether he was willing to receive them; that he told him that they had several times refused to accept a deed unless the quitclaim from the Marrs was first obtained, and that the Webers were getting tired of it and wanted the matter closed up; that Lambert replied that if the cloud was still on the title he would not take it. Lambert denies this, but says he called at Judge Look's office on the morning of the 27th with Mr. Ward, his attorney. Mr. Ward testified that he called on Judge Look in the morning of September 27, and told him that, so far as the title was concerned, the Lamberts were willing to take a warranty deed without the quitclaim from the Marrs and pay the money; that Look put the matter off, said he was busy, and at halfpast 1 he went over again and found Judge Look still engaged. An interview was arranged for at 4 o'clock in the afternoon of that day. Mr. Ward testified that he called at 4 o'clock, as had been arranged, but found Judge Look still engaged, and went away; that he called the next morning, and, finding Judge Look still engaged, he wrote and sent him the following note:

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"DETROIT, MICH., Sept. 28, 1889."

"JUDGE LOOK,—

"*Dear Sir:* Relating to the Weber-Lambert matter, what I desire in acting for Lamberts is that I have the privilege of examining the deed proposed to be made by the Webers, and the abstract of title of the property to be conveyed. If the record title appears satisfactory, with the exception of the lack of the deed from the Marr children, the Lamberts will accept a full warranty deed from the Webers, and pay the price fixed in the contract for the premises.

"Very truly, JOHN WARD."

Ward testified that he had previously examined the abstract, but did not know whether there had been any change since his examination; that he wanted to look at the abstract down to the date of drawing the deed. Not getting any reply to this note, Mr. Ward says that he went over at 2 o'clock on the afternoon of the 28th, and Judge Look said that he would not do anything about it.

At this point the defendant Chipman appears in the case. Judge Look testified that when Mr. Lambert called on him on the morning of the 27th of September, and again refused to accept the Webers' deed without a quit-claim from the Marr heirs, he advised the Webers to abandon their contract and pay no more attention to the Lamberts; that he could find them another purchaser for the land; and that, with that view, he talked with defendant Chipman, who was an attorney at law having an office adjoining Judge Look's; that he told Mr. Chipman that he thought there was a chance to make some money by buying this land; that the Webers would take $3,500 for it, and he thought it a good bargain at that price; that, after some negotiations, and on the same day, being the 27th of September, Mr. Chipman agreed to purchase the land for $3,500, pay $1,000 down, and give a mortgage back for the balance, and on the same day a deed was drawn up and executed by the Webers to Chip-

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man in accordance with this agreement; that in the course of the negotiations Chipman learned for the first time of the fact that the Lamberts were in possession of this land, and he thereupon declined to pay the $1,000 down, until the Lamberts should be removed, and he given possession of the land. Thereupon it was agreed that he should execute his note for $1,000, and leave the same in escrow until such time as the Webers could give him peaceable possession of the land. These negotiations do not seem to have been concluded between the Webers and Chipman before the 30th of September, because the mortgage, which was to be given by him for the unpaid purchase money, was executed on that day, and Mr. Chipman testifies that the deed and mortgage were delivered on the same day.

The defendant Chipman claims to be a *bona fide* purchaser of this land from the Webers for value, and without notice that the Lamberts had or claimed any interest. There is nothing in the record to show that Mr. Chipman acted other than in perfect good faith in the purchase of this land, or that he had any other purpose in the transaction than to make what was to be made out of a *bona fide* real estate purchase. He learned before the negotiations were concluded that the Lamberts were in possession, but he was told at the same time that they were in as tenants, and he was not informed that they had or claimed any other rights. But as it clearly appears that he learned before his purchase was concluded of the fact that the Lamberts were in possession of the land, this information was sufficient to put him upon inquiry, and he is chargeable with a knowledge of all the facts which he might have learned by making such inquiry of the Lamberts. It also appears that at the time of the filing of the bill he had not paid anything towards the purchase price. He cannot, therefore, be considered

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or treated as a *bona fide* purchaser for value. The making and depositing of the $1,000 note, to be delivered when he was given possession of the land, was not such a payment of money as would entitle him to the rights of a *bona fide* purchaser for value. By the express terms of his bargain, this note was not to be delivered unless he secured a good title, and the possession of the land purchased.

Treating the case, then, as one wholly between the original parties, I think the complainants are entitled to the relief prayed for. The contract did not contain any definite provision as to when the deed should be made and the money paid. Complainants were to have a good and clear title. The money was to be paid "at the delivery of the deed, and a Burton abstract of title, with tax statements." The parties understood by this that the defendants would show complainants that they had a good title, before they asked them to pay the balance of the purchase money. It is clear that, when the abstract came to be furnished, all the parties, including counsel on both sides, discovered a defect in the title, more apparent than real, perhaps, and yet one which it was deemed advisable to clear up for the benefit of the title, whoever owned it. With this in view, efforts were made to procure the necessary deed from the Marr heirs. It was reasonable that complainants should desire this, and they cannot be treated as in default for thus insisting upon a good title. Nor were they so treated by defendants. The tender of the deed on the afternoon of September 26 was an express recognition of the contract as in force at that time. Judge Look says that he again told Mr. Lambert when he called on the morning of the 27th that the deed was ready, but that the latter refused to accept it. It appears however by the testimony of Mr. Ward that later

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in the same day he called on Judge Look and told him his clients were willing to take the Weber title as it was, and would waive the procuring of the deed from the Marr heirs; that Judge Look was at the time engaged, but told Mr. Ward to call later, and gave no intimation that the contract was to be treated as forfeited until on the afternoon of September 28. This was after Mr. Ward had given notice that the Lamberts had concluded to waive the defect in the title and take it as it was. It was two days before the sale to Chipman was concluded.

Under all the circumstances, the complainants have acted with only reasonable caution. They are Germans, unfamiliar with our language, and therefore especially dependent upon the advice and assistance of counsel. They seem to have followed such advice, and I think they did well to do so. So far as appears in this record, the only delay in closing up the sale has been caused by the failure of the Webers to cure an apparent defect in their title, admitting that they have used every effort to do so. Since complainants have consented to waive this, a decree must be entered requiring defendants Weber to execute, acknowledge, and deliver to the complainants a good and sufficient warranty deed of the land in question, upon their payment of the balance of the purchase money of $3,475, with interest at 6 per cent. per annum from September 27, 1889, less the costs of this suit to be taxed, such payment to be made within 30 days after demand.

The defendant Chipman will be required to reconvey the land by quitclaim deed to the defendants Weber, and the latter to discharge the mortgage given by Chipman to them. The $1,000 note given by Chipman, and left in escrow, will be delivered up to him to be canceled.

The complainants will recover the costs of both courts,

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to be collected only by deducting the same from the purchase money when paid by them as herein provided.

CHAMPLIN, C. J., and LONG, J., concurred. MORSE and GRANT, JJ., did not sit.

EMIL NAGEL v. JOHN P. SCHNEIDER AND MAGDALENA SCHNEIDER.

Chattel mortgage—Building—Reformation.

Complainant filed a bill for the reformation of a chattel mortgage upon a building by inserting therein the description of the land on which the building stood, and which at the time of the execution of the mortgage was held by the mortgagor under a land contract, and to declare it a real-estate mortgage, and to foreclose it as such; and in affirming a decree dismissing the bill it is held that the instrument was only intended by the parties as security on the building.

Appeal from Wayne. (Reilly, J.) Argued October 17, 1890. Decided December 5, 1890.

Bill to reform a mortgage on a building, and declare it to be a real-estate mortgage, and to foreclose the same. Decree dismissing bill affirmed. The facts are stated in the opinion.

Morgan E. Dowling, for complainant, contended:

1. In the absence of a specific agreement to the contrary, there can be no doubt that a building mortgaged is a fixture and a part of the realty; citing Boone, Mort. § 104; *Tharp v. Allen*, 46 Mich. 392; and complainant's mortgage was given to secure a pre-existing debt, describes and covers property known to the law as real estate, and consequently is a real-estate mortgage. It is defective in form, but, inasmuch as it creates a lien upon specific property, equity will enforce it.

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2. In describing a piece of property as "a grist-mill," without describing the land, it was held that the fee in the land upon which the mill stood passed with the mill; citing *Esty v. Baker*, 48 Me. 500; *Maddox v. Goddard*, 15 Id. 224; *Moore v. Fletcher*, 16 Id. 66; *Forbush v. Lombard*, 13 Metc. 109; and the same rule was applied where the property was described as "the saw-mill;" citing *Blake v. Clark*, 6 Greenl. 436; and a mortgage of a building will carry with it the land on which it stands as essential to its use; citing *Wilson v. Hunter*, 14 Wis. 683; *Woods v. Wallace*, 22 Penn. St. 171; *Greenwood v. Murdock*, 9 Gray, 20; *Toms v. Williams*, 41 Mich. 559; *Curtis v. Norton*, 58 Id. 411; *Whitney v. Olney*, 3 Mason, 280; *Gibson v. Brockway*, 8 N. H. 465; and see *Greither v. Alexander*, 15 Iowa, 470, which is precisely in point.

3. Is the mortgage an equitable mortgage? No particular words are necessary to create a mortgage; citing *DeLeon v. Higuera*, 15 Cal. 484; and an agreement not so executed as to make it a mortgage is an incumbrance on land as against the party executing it; citing *Racouillat v. Sansevain*, 32 Cal. 377; and an imperfect agreement intended as a security, no matter in what form, nor the name by which the parties choose to call it, is in equity what is known as an equitable mortgage; citing Boone, Real Prop. § 224; 1 Jones, Mort. §§ 162, 168, 176; *DeLeon v. Higuera*, 15 Cal. 484; and an equitable mortgage may be created by an unsuccessful attempt to appropriate specific property to the discharge of a particular debt; citing *Gale v. Morris*, 29 N. J. Eq. 222; and an agreement intended by the parties to give a lien on property for the payment of a debt, though not executed as required by statute, and therefore not a mortgage in legal form, is good as an equitable mortgage; citing *Abbott v. Godfroy*, 1 Mich. 178.

William Look and *H. F. Chipman*, for defendants, contended:

1. The bill of complaint should be dismissed upon the pleadings and proofs. In this connection we invoke the rule of law that where the answer fully meets the allegations in the bill, which does not waive a sworn answer, the bill must be supported by testimony other than that of complainant; citing *Hart v. Carpenter*, 36 Mich. 402; *Matteson v. Morris*, 40 Id. 52.

LONG, J. The bill is filed in this cause to foreclose a mortgage. The only question raised is whether it is a mortgage of realty or only a chattel mortgage. It is

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conceded that if it is only a mortgage of chattels the action is barred by the statute of limitations, but if a mortgage of realty the bill is properly filed, and that the court below should have granted the decree of foreclosure. On the hearing in the court below, complainant's bill was dismissed.

It seems that, in the year 1876, Emil Nagel and Christian Smith, copartners in business, under the firm name of Smith & Nagel, contracted with John P. Schneider, one of the above defendants, to do the carpenter and joiner work on a building for him upon land which Schneider then held on a land contract. After completing the work upon the building in accordance with the contract, it was ascertained that Schneider was indebted to them in the sum of $976 over the amount he had then paid. To secure the payment of this sum, Schneider gave his two promissory notes, bearing date June 1, 1876, one for $500, payable September 1, 1876, without interest; and one for $476, payable June 1, 1877, with interest at 10 per cent. These notes were secured by the mortgage in question, which was executed by Schneider and his wife, Magdalena. The $500 note was paid. On June 7, 1877, Christian Smith assigned his interest in the other note and mortgage to Nagel. It is to foreclose this mortgage that the bill is filed. Nothing has ever been paid on the note, and the amount claimed is the $476, and interest at 10 per cent. from June 1, 1876.

The mortgage is set out in full in the bill, and apparently was drawn on an ordinary blank form of chattel mortgage. It recites that—

"The said parties of the first part, for and in consideration of the sum of nine hundred and seventy-six dollars, to them in hand paid by the said parties of the second part, * * * do grant, bargain, and sell unto the said parties

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of the second part all and singular the goods and chattels hereinafter mentioned; that is to say, all the two-story combined brick and frame building, with additions, situate north-west corner of Jefferson and Townsend avenues, in the township of Hamtramck, county of Wayne, and State of Michigan."

The power of sale contained in the mortgage is that usually inserted in chattel mortgages,—that sale may be made after six days' notice, by written or printed notice, to be posted in three or more places in the township.

Complainant's contention is that this is an equitable mortgage on real estate. But no description is given in the mortgage of the land upon which the building is situate except as above. The bill sets up this claim, and describes the land upon which the building is situate. The bill also alleges that, at the time the mortgage was executed, John P. Schneider had only an equitable interest in these lands, the legal title being in Moses W. Field, but that, subsequent to the giving of the mortgage, he obtained a deed of warranty of the lands, and that he is now the owner of the legal title. The bill further charges that the complainant was ignorant of legal formalities distinguishing chattel mortgages from real-estate mortgages; that he did not read the mortgage, and supposed that it was sufficient and in proper form to cover the entire interest of Schneider both in the land and building. The bill prays for a reformation of the mortgage by inserting therein a description of the lands upon which the building is situate, and that it be declared a real-estate mortgage. The bill does not waive answer under oath.

The answer is under oath, and denies that the instrument was ever intended to operate as a real-estate mortgage, but was intended and understood by the parties to cover only the building.

The complainant was sworn as a witness in his own

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behalf, and his testimony falls far short of showing that any mistake was made in the form of the mortgage, or the interest of Schneider which it was intended to cover. It was taken by the complainant, treated as a chattel mortgage, filed as such, and renewed from year to year for three or four years, since which time the complainant has not renewed it, or treated it as a valid claim. He testifies that he did not continue to renew it for the reason that he had put money enough in, which he did not expect to get. The case does not, however, rest there. The defendant John P. Schneider was called as a witness in his own behalf, and testified that, at the time of the execution of the instrument, he told the parties he could not give a mortgage on the land, as he did not own it.

We need not discuss the question as to what effect this instrument would have had as relating to the realty if it had been intended by the parties at the time of its execution that it should be a lien on the realty. The parties made the contract intending that it should only be held as security on the building.

The decree of the court below must be affirmed, with costs,

CHAMPLIN, C. J., and CAHILL, J., concurred. MORSE and GRANT, JJ., did not sit.

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83 412
102 486

WILLIAM F. ATKINSON v PAUL WEIDNER ET AL.

[See 79 Mich. 575.]

Bills and notes—Married woman—Discontinuance.

1. A discontinuance as to a married woman, who was one of four payors in a *joint* promissory note, in a suit on the note, will not prevent the rendition of a valid judgment against the remaining defendants.
2. The remaining questions in this case are ruled by the former opinion, reported in 79 Mich. 575.

Error to Wayne. (Hosmer, J.) Argued October 17, 1890. Decided December 5, 1890.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion, and in the former report of the case.

William Look and *H. F. Chipman* (*Edwin F. Conely*, of counsel), for appellants.

Charles M. Swift (*Otto Kirchner*, of counsel), for plaintiff.

CHAMPLIN, C. J. This case was before this Court at the January term, 1890, and is reported in 79 Mich. 575. We refer for a statement of facts to the opinion in that case.

In the opinion then handed down, it was stated that the defendants' claims on the trial were—

"1. That the defendants did not understand that the paper signed by them was a promissory note.

"2. That there was a contemporaneous parol agreement that the note should not be payable according to its terms.

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"3. That there was a trust created; and, in view of such trust, which will be outlined hereafter, defendants' liability upon this note can only be ascertained and fixed in a court of equity by an accounting.

"4. That, if Atkinson can collect this note at all, he can do so only for the purposes of this trust, in discharge of which the defendants ought to receive part of the proceeds of the note; and, if such note has been assigned by Atkinson to Booss & Co., it will not be used for trust purposes, and therefore defendants ought not to be compelled to pay it."

After the judgment was reversed by us, and the case sent back for a new trial, the defendants amended their notice to the plea of the general issue, in which they set up, as a further defense, that Atkinson, by his fraud, negligence, mismanagement, lack of capacity, and other misconduct in the direction and carrying on of defendants' business while acting as their attorney, had caused the loss and failure of the consideration of the note sued upon, as well as the total loss of the original claims against said Heine. Defendants urge here another defense,—that Atkinson has in his hands sufficient property and money from the Heine estate to pay the note in question, and he should pay the same out of the money in his hands before calling upon the defendants to respond, the trust being good as between the parties. At the close of the testimony, the court took the facts from the jury, and directed a verdict for the plaintiff for the amount of the note sued upon, and interest.

The testimony introduced in evidence in this suit is substantially the same as that introduced upon the first trial of the case, and which we considered in deciding it when the case was here before. The last additional defense set up to the claim by the defendants was passed upon and settled by us at that time. The other additional defense—that Atkinson by his fraud, negligence, etc., while acting as attorney for defendants, had

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caused the loss and failure of the consideration of the note sued upon—is not substantiated by the testimony. On the trial, the testimony disclosed the fact, and as to which there is no contradiction, that the consideration of the note sued upon consisted of goods sold and delivered to defendants equal in value to the full amount of the note given; and, for reasons set forth in the former opinion of this Court, such defense cannot be made available against the note in suit, whatever may be the rights of the parties in a court of equity to compel an accounting and an enforcement of the trust.

The counsel for the defendants requested the court to charge the jury that Mrs. Hoffman, being a married woman, could not be held liable upon the note. The court so held, and the plaintiff discontinued as to her. The counsel for defendants now contend that no judgment can be rendered against the remaining defendants, as the obligation was joint as to all of the parties to the note. But this does not follow. She was discharged because she was not bound by the promise, and therefore the obligation was the joint obligation of those who were qualified to enter into it, and they alone are bound by it.

The relation of these parties to the note in suit is peculiar. As pointed out in our former opinion, the judgment in the United States court bound the goods in the plaintiff's hands as garnishee, and the note stands in place of the goods in his hands; and, under the circumstances of this case, the plea of recoupment should not be allowed.

The judgment must be affirmed.

CAHILL and LONG, JJ., concurred. MORSE and GRANT, JJ., did not sit.

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THE FORT-STREET UNION DEPOT COMPANY v. HENRY K. JONES AND MATHILDA CASS THOMPSON.

83 415
92 61
83 415
s47NW 349
131 s383
83 415
s47NW 349
133 s104
83 415
140 s397
83 415
146 s331

Railroad companies—Condemnation proceedings—Prior negotiations—Province of jury—Appeal.

1. The negotiations for the purchase of property required by the statute before instituting proceedings for its condemnation contemplate *knowledge* on the part of the land-owner of the *purpose* for which the land is wanted.
2. A *bona fide* offer by a railroad compay of an amount which it considers a fair price for land, and a refusal by the owner to accept it, are sufficient negotiations, within the condemnation statute; and it is of no consequence that the agent making the offer had no expectation that it would be accepted.
3. In condemnation proceedings the jury are judges of law and facts, and their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, as much as the testimony of witnesses to matters of opinion; citing *Railway Co. v. Dunlap*, 47 Mich. 466; and appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result.
4. While, under the statute, this Court may, upon appeal, set aside an award of a jury in condemnation proceedings, and order a new appraisal, this should only be done where it is clear that the award is against the evidence.

Appeal from Wayne. (Full bench.) Argued October 17, 1890. Decided December 5, 1890.

Proceedings to condem land for purposes of union depot. Respondents appeal from an award of $10,000 and $21,000 respectively. Proceedings affirmed, and appeal dismissed. The facts are stated in the opinion.

Walker & Walker, for respondents, contended:

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1. The inability of the petitioner to acquire the property amicably by agreement with the owner is jurisdictional, and must be alleged, and may be controverted; citing *Railroad Co. v. Sanford*, 23 Mich. 418; *Railroad Co. v. Weiden*, 69 Id. 572; and the petitioner cannot truly aver such inability without effort by some one authorized to bind it to induce respondent to accept an offer made honestly, and not merely formal and colorable; citing *Railroad Co. v. Weiden*, 70 Mich. 390.

F. A. Baker, for petitioner, contended for doctrine stated in the opinion.

GRANT, J. This was a proceeding brought by the petitioner for the condemnation of lands for its use. All questions of the constitutionality of the act under which the petitioner was organized were raised and disposed of in the case of *Fort-street Union Depot Co. v. Morton, ante*, 265.

Three other objections are raised by the respondents to the validity of the proceedings, viz.:

1. No negotiations were had with the respondents for the purchase of the property prior to the commencement of the proceedings.
2. The petitioner was permitted to offer in evidence the price it had paid for neighboring property for its own use.
3. The awards of the jury were against the weight of evidence.

1. Mr. C. B. Lothrop, on behalf of the petitioner, conducted the negotiations with the respondents. It is evident that both the respondents before the conclusion of the negotiations, and before the final offer was made to them by Mr. Lothrop, fully understood that he was acting on behalf of the petitioner. One Mr. J. Huff Jones represented Mrs. Thompson, who was not a resident of Detroit. Mr. Lothrop testified that Mr. Jones had charge of the lots; that they were for sale, and that he first fixed the price at $150 a foot; that Jones

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agreed to submit the matter to Mrs. Thompson; that she refused to sell at that price; that Jones again fixed the price at $25,000,—a little over $150 a foot; that they finally agreed upon that as the price. Up to this time respondents had not learned the purpose for which the lots were wanted. Mr. Lothrop further testified that, after the articles of incorporation were filed, he again saw Mr. Jones, who said he could not give him a decided answer; that Mr. Jones gave him a letter of introduction to Mrs. Thompson; that she said she left it entirely in the hands of Mr. Jones; that he then made a formal offer of $180 a foot, which, in his judgment, was more than the property was worth; that he wrote to respondent Jones, in Boston, making him a formal offer of $180 a foot; that Jones wrote back declining it; and that when Jones returned from Boston he again refused to accept the offer. On cross-examination, witness testified that when he made the offers to respondents he had no expectation that either would accept.

So far as the negotiations which were conducted prior to the time that respondents knew the purpose for which the land was wanted, they were not within the statute. These negotiations provided for by the statute contemplate knowledge on the part of the land-owners of the purpose for which the lands were wanted. If the negotiations stopped there, we should be compelled to hold the proceedings void. But, as already stated, before the negotiations, closed, the respondents had such knowledge. A *bona fide* offer of an amount which the petitioner considered a fair price, and the refusal to accept it, are sufficient negotiations, within the statute. It is of no consequence that petitioner's agent had no expectation that the offer would be accepted.

2. The second objection is ruled by *Toledo, A. A. &*

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G. T. Ry. Co. v. Dunlap, 47 Mich. 466, where, Mr. Justice CAMPBELL, in delivering the opinion, said:

"In all such cases the Constitution, as well as the principles of the common law, makes them [the jury] judges of law and fact. * * * Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion."

It was there also held that the functions of the judge in such cases were advisory merely, and that such controversies as this cannot be disposed of on merely technical notions. These proceedings may be instituted in probate courts, the judges of which are frequently not lawyers, and are unfamiliar with the rules of evidence. If they were to be set aside on account of errors in the admission or rejection of testimony, the difficulty of obtaining a finding by the jury which could stand the test would be apparent. Appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result. The proof here complained of cannot be said to have exercised any such influence.

A careful examination of the testimony upon the question of values does not convince us that a case is made calling for the interference of this Court. While, under the statute, this Court may, upon appeal, set aside an award of the jury, and order a new appraisal, this should only be done where it is clear that the award is against the evidence. In this case, the damages awarded were within the values placed upon the property by several witnesses.[1] The jury knew the purpose for which the

[1] Defendant Jones was awarded $10,000, and defendant Thompson $21,000.

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land was to be condemned, and we cannot say that they did not consider the value of the land for that purpose. They viewed the premises, saw the witnesses while testifying, and were chosen because of their supposed knowledge of the value of real estate in the vicinity. We cannot say that the award was against the evidence, or even against the weight of evidence.

We find no error in the proceedings, and they must therefore be affirmed, and the appeal dismissed, with costs.

The other Justices concurred.

THE CORTLAND MANUFACTURING COMPANY (LIMITED) v. GEORGE W. PLATT ET AL.

83 419
122 114

Fraudulent purchase—Right of rescission—Commercial agencies—Evidence—Use of memoranda.

1. A defrauded vendor does not lose his right to rescind by making an effort to compromise or obtain payment for the property, unless he does some act which evinces a clear intention to waive such right.
2. Where a witness makes use of *memoranda* in testifying, and swears that he could not testify to the exact figures without its aid, and to that end had used it throughout his direct examination, the attorneys for the opposing party are entitled to an inspection of the paper to enable them to cross-examine the witness; citing *Duncan v. Seeley*, 34 Mich. 369; *People v. Lyons*, 49 Id. 78.
3. This Court has not gone so far in any case as to hold that traders must report to the commercial agencies every variation in their circumstances.
4. It is only when traders are in an insolvent condition, and are or should be aware that they will be obliged to suspend or fail in their business, that they owe it as a duty to creditors, or

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those they solicit to deal with them upon credit, to inform them of their situation, or to notify the commercial agencies of their changed situation, and purchases not made in good faith, while in such straits, may well be regarded as fraudulent.

5. Fraud cannot be predicated upon the fact that a merchant or trader makes a truthful representation of his standing to a commercial agency, and thereby obtains credit. If a considerable time elapses, and no new representations are made, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the agency.
6. Fraud is a question of fact to be deduced from all of the circumstances, and a vendor cannot shut his eyes to subsequent reports of the commercial agencies tending to cast doubt and suspicion upon the financial ability and credit of a merchant or trader, and rely upon a year-old statement made by such person.
7. In this case the jury found specially that the defendant was worth $5,000, or more, over and above all liabilities, when he purchased the goods of the plaintiff which are sought to be reclaimed, and that at that time he intended to pay for them, which finding is held to be inconsistent with any verdict except in favor of the defendants.

Error to Berrien. (O'Hara, J.) Argued October 29, 1890. Decided December 5, 1890.

Replevin. Defendants bring error. Reversed, and case remanded, with instructions to trial judge to vacate judgment for plaintiff, and to render one in favor of defendants, to the end that such further proceedings may be had as are allowed by statute. The facts are stated in the opinion.

Spafford Tryon and *G. M. Valentine*, for appellants.

George S. Clapp, *A. Plummer*, *N. A. Hamilton*, and *Lawrence C. Fyfe*, for plaintiff.

CHAMPLIN, C. J. Plaintiff brought replevin for certain wagons, poles, and seats.

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The defendant George W. Platt had, prior to February 3, 1889, been engaged in the mercantile business at Benton Harbor, the principal line of his business being hardware. He was also interested in the milling business at that place. He was assisted in his store by his son, Frank H. Platt, who, during his father's absence or inability to attend to business on account of sickness, exercised full control over the business. In 1887, George W. Platt drew money out of his hardware business to invest in the milling business; and, to meet a bank-note and bills maturing, on August 7, 1887, he borrowed $3,000 of the Bank of Benton Harbor, and gave security by way of a chattel mortgage upon his stock of hardware. This mortgage was, by mutual consent, not placed upon file, and in December, 1887, this debt had all been paid except $900, for which the bank took three notes, of $300, $100, and $500, respectively. On January 27, 1888, there was due on this mortgage the principal sum of $600, and on that day, unknown to Platt, the mortgage was placed on file. On February 2, 1888, the mortgage was paid in full and discharged. The filing of the mortgage caused inquiries to be made by the creditors of Platt, who was then sick; and his son, Frank H., without the knowledge of his father, prepared, and on February 10, 1888, gave to the collecting agency of R. G. Dun & Co., a statement of the financial standing of George W. Platt on January 1, 1888, as follows:

STATEMENT.

Benton Harbor Milling Co.	$4,000 00
41¼ acres in city limits, Niles, Mich.	5,000 00
House and lot, St. Jo., Mich.	2,000 00
One-seventh interest in estate, Niles, Mich.	1,000 00
One-half interest in store, lot, and building, Bangor, Mich.	500 00
	$12,500 00
Incumbrance on above	5,000 00
	$7,500 00

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Invoice merchandise	$14,031 27	
Tinners' tools and store fixtures	836 00	
Notes	2,165 56	
Accounts receivable	5,353 05	
Freight, boxing, and carting on merchandise, 3 per cent	419 73	
	$22,805 61	
Liabilities, sundry accounts	7,615 49	15,190 12
Total assets in excess of liabilities		$22,690 12

A schedule of liabilities upon merchandise accounts was attached. The correctness of the statement was sworn to by Frank H Platt. On May 12, 1888, Dun's agency attached to such statement of Platt "an opinion of statement" of their own, as follows:

"OPINION OF STATEMENT.

"May 12, '88. Should suppose that the only question here would be as to the value of real estate, etc. Writer has seen his ledger, which shows, as he recollects it, something of this sort: 'Estimated Niles property at $5,000.' Understand that it is worth about $4,000."

Again, on June 5, Dun's agency made another report, as follows:

"June 5, 1888.

"In writer's opinion, following is a more correct statement:

Invoice of merchandise	$8,000 00
Tinners' tools, etc.	500 00
Farmers' notes	2,165 56
Accounts receivable	5,353 05
Three per cent. for freight, etc	419 73
"Have very good reasons for placing the invoice at	$8,000 00
The tinners' tools are old, and more or less out of date, and hardly worth $500	500 00
The farmers' notes may foot up the figures given, but for some reason were not discountable at the time of the chattel mortgage difficulty, Feb. 2, 1888	2,165 56
Accounts receivable are not worth over 50 cents on the dollar	3,211 83

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Three per cent., boxes, carting, etc.	$240 00
Total	$14,117 39
Total indebtedness on stock	7,615 49
Balance	$6,501 90
160 shares in milling company, at $25	4,000 00
41 acres, Niles city limits	5,000 00
St. Joseph house and lot	2,000 00
One-seventh interest in house of Platt estate	1,000 00
One-half interest in Bangor house and lot	500 00
Total	$19,001 90
Mortgage incumbrances	5,000 00
	$14,001 90

"As to 160 shares, he first bought 80 shares at $25, making $2,000; subsequently subscribed for 80 more, and hypothecated the first 80 to secure the payment of the second 80, leaving only, say $2,000. The 41 acres are not worth $5,000. They are not worth more than $2,500. An outside figure is $3,000. The St. Joseph house and lot he recently sold for $1,500. One-seventh interest in the Geo. Platt family residence at Niles, Mich., is good, but not available. One-half interest in Bangor house and lot is not worth more than the other half, which recently sold for $350.

"*Recapitulation.*

Assets, stock		$14,117 39
Indebtedness, stock		7,615 49
Balance assets		$6,501 90
Real-estate assets	$7,850 00	
Real-estate mortgage	5,000 00	2,850 00
Assets in excess of liabilities		$9,351 90

(*Continued.*)

"June 2, '88. The mortgage was dated Aug. 8, '87, but was not filed until Jan. 28, 1888. The note to which the mortgage was collateral was due Nov. 5, 1887, so that this nominal security was in reality not security for the interval from Aug. 8, '87, to January 28, 1888. In the mean time Mr. Platt had paid on the claim $2,265.23, so

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that at the hour of filing there was due, plus the interest, $734.78. In the afternoon of the same day $9.25 more was paid.

"So far as Mr. Platt himself is concerned, we would not have doubted his integrity, and did not file the mortgage on that account, but to anticipate any other creditors, of whose number or extent we were not thoroughly informed. Have known Mr. Platt for some years, and have believed him personally to be a man with no bad habits nor expensive tastes, whose whole time was devoted to his business, and whose desire was to pay all his obligations. It is our opinion that one cause of his temporary embarrassment at the time of our loaning this money was the purchase of stock in the Benton Harbor Milling Company, and some other matters tending to build up and benefit this place. The milling stock is, we understand, good paying property, but it has taken the cash to pay for it."

"August 8, '88. Carries the largest stock in his line here. Has been heavily involved for some time, and came near making an assignment last winter, but instead executed a chattel mortgage to the Bank of Benton Harbor, securing $3,000, which was discharged from record after being nearly paid up, and bank took a mortgage on some real estate near Niles. Platt is treasurer of the Benton Harbor Milling Co., and owns $4,000 of the stock, which is hypothecated for a loan of $2,000. Is said to sell on very close margins and below cost on many articles, and it is not deemed probable that he is making any money. Is said to have a nominal surplus of 8 to $10,000, but is not regarded a very safe credit risk."

"Jan. 25, '89. Has a large trade, but is reckless in selling. Stock about $7,000. Is hard up, but not so much so as at one time. Worth about $10,000 above debts. 6–3–1–2."

With this statement as to Platt's financial standing, and with a rating in Dun's Commercial Agency of from $5,000 to $10,000 capital invested in his business, the plaintiff in this suit received a letter from Platt, dated February 3, 1889, requesting it to quote prices on its carriages, stating that he should probably sell a few very fine outfits that season, to which the plaintiff replied,

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under date of February 10, stating prices, and terms of discount and credit. Afterwards the salesman of plaintiff called personally upon Mr. Platt. and on March 7, 1889, received his order, upon the terms of 90 days net, 5 per cent. 30 days. Two days later, Platt wrote plaintiff requesting it to add to the order three spiral-spring carts. Plaintiff commenced shipping the goods March 30, 1889, and made two more shipments in April, when, before the goods were all shipped and on April 29, Mr. Platt wrote plaintiff requesting it to cancel order for carts and buggies. It appears that, about the same time, defendant Platt canceled other orders which he had made for goods from other parties, for the reason that he became satisfied that he should not be able to pay for them.

The plaintiff clams that it sold the goods and extended the credit to defendant Platt solely upon the strength of the rating statement of Platt, and reports received from Dun & Co., above set out. It also claims that such statement was false and fraudulent, and made for the purpose of inducing plaintiff to sell to him upon credit, and that, on account of such fraud, it had a right to rescind the sale and reclaim the goods. Plaintiff also claims that Platt, at the time he purchased the goods of plaintiff, did not intend to pay for them. Accordingly the plaintiff sent its attorney to Benton Harbor, where he arrived on May 18, 1889. This was on Saturday. He called at the store, where he found Frank H. Platt, and was informed that George W. Platt was sick. He told Frank H. that he had heard that they had been putting some mortgages on the property there, and it was not looking just right, and he had come to see what there was about it. Frank H. told him they had given some mortgages, and, upon further inquiry, he stated to whom, and the amounts. He was told that the mortgages covered the whole stock, including the wagons, and he said to Frank

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that they did not send the wagons to him to be mortgaged for old family debts, but they were sent supposing Platt would sell them in the course of business, and then pay for them. He replied that they should pay their debts; they expected to; they should get their money upon their notes and accounts, and pay everything in three months. He then told him that he did not want to make unnecessary trouble; that he did not like the looks of things there; and if he thought he was going to pay in three months, if he could give plaintiff a note payable in six months, with an indorser, without interest, it would be satisfactory to it. It would give him three months' extra time in case he did not get around to pay all his debts. Frank said he did not want to do that. Further conversation ensued, in which the plaintiff's agent suggested that perhaps Platt could get Mr. Tatman, who then held a chattel mortgage as security for indorsing defendant's notes, to sign a note with Platt for the debt due plaintiff, and he said he would not want to do that. The witness testified:

"I said to him: 'If you are not willing to do that, I have not much faith in your talk about paying within three months. With these mortgages here, you cannot expect us to be easy.' Then I said to him: 'So we shall have to reclaim our goods. These wagons we shall take back.' That is what I was here for,—to reclaim these wagons if the matter was not satisfactory, so we could get the pay out of it."

It is claimed by defendants' counsel that this was such a recognition of the contract relations between the parties as amounted to a ratification of the contract of sale. But I do not think so. It was a mere effort to get security for payment of the debt. Had he taken security, or given a valid extension of time of payment, it would have been different. A person defrauded does not lose his right to rescind by making an effort to compromise or

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obtain pay for the property, unless he does some act which evinces a clear intention to waive his right to rescind.

For the purpose of showing the falsity of the statement made by Frank H. Platt of his father's financial standing on January 1, 1888, J. H. Breckenridge was introduced as a witness on the part of the plaintiff, and testified that he had been a book-keeper for 15 or 16 years at Joliet and Chicago, Ill., and had examined the books of account of George W. Platt with F. A. Hobbs. On his direct examination, he testified that on January 1, 1888, the books showed net assets $13,376.24, and that there was a difference between what the books showed and the statement of $9,313.88. He attempts to explain the method he pursued to reach his conclusion, which from his testimony is not very satisfactory. He deducts items which the books of George W. Platt show were in the banks at that date, because an examination of the books of the banks shows that certain checks had been charged up against the accounts, making a difference of $1,027.44; but it was shown that the checks had been used in reducing liabilities to that amount. He deducts $2,000 from real estate, for the reason that he finds from the cash-book the house and lot had been sold, and the proceeds put into the store, and a note given therefor to Jane E. Platt, which he puts with the liabilities. He admits that the accounts receivable, as shown by the books, were $4,926.94, and the bills receivable were $1,925.56, making a total of $6,852.50; and that in his *memoranda* he only called them $3,426.25; and that, counting them at their face, Platt would be worth $3,426.25 more than he had testified he was worth the day before.

It appears that this witness testified from *memoranda*, and that, upon adjournment of court in the evening before he was cross-examined, counsel for plaintiff furnished

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defendants' attorney with a copy of some figures purporting to be those used by the witness. The next morning the court called upon counsel for defendants to produce such *memoranda* and have them marked as an exhibit. They had not been offered in evidence, and counsel for defendants did not admit them to be copies of the *memoranda* from which witness testified. Nevertheless the court insisted that they should be marked as an exhibit, to be printed with the record in case the cause should be taken to the Supreme Court, but should not be read in evidence or considered in evidence upon the trial. The court stated that he made "the order in view of Mr. Valentine's refusal last evening to admit that these figures were furnished by counsel." Exception was taken to such ruling. That this was error there can be no doubt, but, so far as we can see, it was harmless error. The exhibit is returned and printed in the record, but is not considered by this Court.

Error which was prejudicial was committed upon the examination of the witness F. A. Hobbs. He was a bookkeeper and coal-dealer, and lived in Benton Harbor. He assisted Breckenridge in the examination of the books, and, in testifying, made use of *memoranda*, and swore that he could not testify to the exact figures without the aid of the *memoranda*, and that he had used it to get at the exact figures throughout his direct examination; that all the figures upon it related to the examination of the books made by him and Breckenridge. Counsel for defendants requested the privilege of inspecting the paper to enable them to cross-examine the witness. Counsel for plaintiff refused, and the court sustained the objection. *Duncan v. Seeley*, 34 Mich. 369; *People v. Lyons*, 49 Id. 78.

G. L. Marchand, a witness produced by the defendants, testified that he has been an accountant since about 1871,

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and had been employed by wholesale dealers of Chicago, and by the auditor of the state of Illinois; that he had examined the books of George W. Platt, with a view of ascertaining his assets and liabilities on January 1, 1888, January 1, 1889, and May 20, 1889. He produced detailed statements from which it appears that George W. Platt's net investment on January 1, 1888, was $24,533.68; on January 1, 1889, it was $10,835.82; and on May 20, 1889, it was $12,009.58; that the net shrinkage in the assets between January 1, 1888, and May, 1889, was $12,524.10, and he gave the items by which he accounted for such shrinkage. He also testified that "G 3½" represented a rating in Dun's Commercial Agency; that the letter "G" is supposed to represent the amount of capital invested, and stands for from $5,000 to $10,000. "3½" refers to his credit, and means "fair."

The statement and reports accompanying sent out by Dun & Co., and received and acted upon by plaintiff, afforded, under the testimony in this case, no ground whatever for rescinding the contract of sale. The last report, dated January 25, 1889, was that George W. Platt had a large trade, but was reckless in selling; that he had a stock of about $7,000; that he was hard up, but not so much so as at one time,—worth about $10,000 above debts. The jury were asked to find, and returned that they found, that, in making the sale, the plaintiff relied upon the R. G. Dun & Co. report in evidence; and they further found that George W. Platt was worth, at the time he made the contract for the goods in question, $5,000, or more, over and above all his liabilities, and that when he purchased such goods, he intended to pay for them. Taking the whole of the reports made by Dun & Co., the facts therein shown to exist correspond with this finding of the jury. There was ample testimony in

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the case to justify such finding, and the court should have charged the jury that unless the testimony satisfied them that, at the time George W. Platt purchased the goods, he did not intend to pay for them, or unless they were satisfied from the testimony that, at the time he purchased the goods, there was a substantial difference between the report of Dun & Co. as to his financial standing and his actual financial condition at that time, so great as to convince them it was the intention of George W. Platt to defraud the plaintiff by obtaining such goods upon credit, then their verdict should be for the defendants.

This Court has not gone so far in any case as to hold that traders must report to the mercantile agencies every variation in their circumstances. It is only when they are in an insolvent condition, and are or should be aware that they will be obliged to suspend or fail in their business, that they owe it as a duty to creditors, or those they solicit to deal with them upon credit, to inform them of their situation, or to notify the commercial agencies of their change of situation. Purchases not made in good faith, while in such straits, may well be regarded as fraudulent. But no fraud can be predicated upon the fact that a merchant or trader makes a representation of his standing which is truthful at the time to a commercial agency, and thereby obtains credit. If a considerable time elapses, and no new statements are made, and no new representations as to his standing, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the commercial agency. Fraud is a question of fact to be deduced from all the circumstances, and a vendor cannot shut his eyes to the subsequent reports of the commercial agencies tending to

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cast doubt and suspicion upon the financial ability and credit of a merchant or trader, and rely upon a statement by such person made a year before.

The court correctly instructed the jury, as a matter of law, that the plaintiff had a right to rely upon such report, inasmuch as Platt himself had made a statement to R. G. Dun & Co., but that it must be presumed that the plaintiff, if it relied at all upon the report, relied upon the report sent by R. G. Dun & Co. as a whole, and not upon any particular part of it. But the court immediately after proceeded, inadvertently, it may be presumed, to instruct the jury as follows:

"Now, then, gentlemen, if Geo. W. Platt on January 1, 1888, was worth a material sum less than appears from the representations made by Frank to R. G. Dun & Co., and if plaintiff, when shipping the wagons, relied upon such statement, and shipped them on the strength of such statement, and if, when the wagons in question were shipped, Geo. W. Platt's pecuniary affairs were materially worse than was disclosed in the report of R. G. Dun & Co. as a whole, this plaintiff had the right to rescind the contract of sale, and to take back all wagons not sold to *bona fide* purchasers, no matter whether Frank H. Platt did or did not intend to make a false statement to R. G. Dun & Co."

Here the statement made by Frank H. Platt is given undue prominence, and the jury are told that if plaintiff relied on this statement, instead of the report as a whole, as he should have charged, then the plaintiff could rescind. It is true that this error was modified subsequently by including the whole report, as an inducement to the sale; but we cannot say that the jury did not give weight to this portion of the charge, more especially as we cannot otherwise conceive of any basis for a general verdict for the plaintiff. The special finding above stated required that the general verdict should have been rendered for the defendants. It is the only one that can be

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rendered consistent with the special findings. This view of the merits renders it unnecessary to discuss many of the errors assigned upon the record.

The defendants' counsel moved the court that judgment be entered for the defendants upon the special findings of the jury, which motion the court refused, and instead rendered a judgment for the plaintiff upon the general verdict.

The judgment must be reversed, and the cause remanded, with instructions to the trial court to vacate and set aside the judgment for plaintiff, and to render judgment in favor of defendants, to the end that such further proceedings may be had therein governing the action of replevin as the statute requires. The defendants are entitled to the costs of both courts.

The other Justices concurred.

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CLARRIE A. APSEY, ADMINISTRATRIX, ETC., v. THE DETROIT, LANSING & NORTHERN RAILROAD COMPANY.

Railroad companies—Injury at highway crossing—Contributory negligence.

In this case it is held that in any view which can be taken of the testimony of the witnesses who saw the conduct of plaintiff's decedent, the substance of which is given in the opinion, it appears that he was not in the exercise of that care and caution which under the repeated decisions of this Court it was his duty to observe in approaching and crossing a railroad track.

Error to Ingham. (Peck, J.) Submitted on briefs October 31, 1890. Decided December 5, 1890.

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Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

R. A. Montgomery, for appellant, contended:

1. The case of *Brady v. Railroad Co.*, 81 Mich. 616, is strongly in point; and if the Court adheres to the well-settled doctrine that the plaintiff must show an absence of negligence upon the part of the decedent, the judgment in this case should be reversed. The testimony of the engineer bore directly upon the contributory negligence of the deceased, and it was undisputed; citing *Underhill v. Railway Co.*, 81 Mich. 43.

Charles B. Lothrop, for appellant.

Frank L. Dodge and *C. P. Black,* for plaintiff, contended:

1. No case should be taken from the jury when to do so will prevent their giving to either party benefits of any inferences which might be drawn from a comparison of all the facts; citing *Staal v. Railroad Co.*, 57 Mich. 240; and where the evidence tends to show actionable negligence on the part of the defendant, the case should be submitted to the jury; and in determining whether such is the tendency of the evidence, the testimony upon the subject on the part of the plaintiff must be taken as true; citing *Sheldon v. Railroad Co.*, 59 Mich. 172, and cases cited.

CHAMPLIN, C. J. At Meridian station, in Ingham county, where the railroad runs nearly east and west, there is a highway crossing the track, running north and south. About 10 o'clock in the forenoon of July 7, 1888, an east-bound train that did did not stop at the station passed over the highway. A man named James Apsey was riding in a top buggy drawn by a single horse along the highway, coming from the south of the track towards the north. With him was his son, Willie, aged 11 years. They collided with the passing train, killing them both instantly. For the death of the son, the plaintiff, who is his mother, brings this action as administratrix of his estate.

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From a point lying at the east of this highway crossing to a considerable distance west, the ground had been excavated for the road-bed of defendant's track. Some of the surplus earth was piled upon the company's right of way west of the highway crossing. In order to bring the highway to a grade with that of the railroad, the road-bed of the highway had been excavated a short distance south of the railroad. This excavation was from 2 to 4 feet in depth, and extended back from the railroad track a short distance. On the south side of the railroad track a ditch was excavated for the purpose of carrying off the water, and over this ditch the company had constructed a bridge of plank, all of which were 14 feet in length, running crosswise of the highway. On the west side of the highway, as it approached the railroad, there were obstructions which prevented a person passing along the highway at that season of the year from obtaining a view of defendant's track and cars approaching thereon, for a distance of some 12 or 15 rods south of the crossing to a point which was from 25 to 45 feet south of the track. The testimony is conflicting as to the exact distance from the track at which a person riding in a buggy could see a train approaching from the west, but there was not much if any conflict that a train might be seen approaching from that direction at or about the intersection of the defendant's right of way with the highway, which at that place was 45 feet south of the track. The view was obscured by buildings, an orchard, and the embankment before referred to.

The uncontradicted testimony of plaintiff shows that on the east side of the road stood the dwelling-house of one Rorback, and that Mr. Apsey, the driver of the horse, on approaching the railroad track on that occasion, in passing north, followed the usually traveled and beaten

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track of the road until nearly opposite the Rorback house, and at that point the indications manifested by the track of his buggy showed that he turned to the right, and proceeded a short distance, and then curved into the road again, as if he had at first intended to turn around at that point; and, from the indications, he had proceeded on towards the railroad track until he came to a point near the bridge, before referred to, across the ditch, when he turned to the right, the wheel of the right-hand side of the buggy passing on the edge of the embankment, and the wheel upon the left-hand side leaving the bridge over the ditch at the east end, at which point the horse and wagon came in collision with the locomotive engine, the horse striking against the cylinder, and the plaintiff's husband and his son being thrown upon the driving-rod of the engine, causing, as before said, almost instant death to the father, and instant death to the son.

It is claimed on the part of plaintiff in the declaration in the case that the defendant was negligent, and that James Apsey, the driver of the horse, and his son, Willie Ray Apsey, were in the exercise of due care and caution, and that the injury resulted without fault or negligence on their part. The negligence of the defendant alleged in the declaration consisted in not giving the statutory signals required upon approaching a highway crossing, the obstruction of the view by the embankment, and in running its cars at too great a rate of speed past a point where the view of the track and train was thus obstructed. It appears that the deceased, James Apsey, resided at or near Meridian station, and was familiar with the highway crossing at that point; and defendant claims that the testimony in the case is conclusive that James Apsey was guilty of contributory negligence, and that therefore the plaintiff was not, under the declaration, entitled to recover.

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Upon this point, four witnesses gave testimony in behalf of the plaintiff, and one in behalf of defendant.

The first witness called who saw James Apsey and his son at or about the time of the accident was Archie Glosser. He was standing by the fence in the grain-field 15 or 20 rods west of the crossing. He saw Apsey and his son as they were driving towards the track. He says that they were looking up the track—*west*—as if they were looking for the train; that he watched them until they got out of his sight in a kind of a bank that was there, and that they dropped down into what is called a "cut," and that was the last he saw of them. He saw the train after they had disappeared from his sight, and heard the danger whistle sounded. They commenced sounding the alarm whistle at about the time they were at the switch, and sounded all the way down to the crossing. He did not remember at what gait Apsey was driving, and could not tell whether it was fast or slow. He says he could see Apsey until he got within 15 or 20 feet of the crossing, and after that he could not see him.

The next witness was Mary Jane Williams. At the time of the accident she resided at Meridian station, in the house known as the "Williams House." It was situated on the south side of the railroad track, and fronted upon the highway, and faced east; the house itself standing a few feet south of defendant's right of way. At the time of the accident she was sitting in a room in the wing part of the house, which stands at the north of the main building. She saw Apsey and his son when they passed the house. She says they were not driving very fast, she thinks they were walking,—"just walking;" that Apsey and his son were looking to the west; that she heard the danger signal sound, and at that time they were right in

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front of the house; that at the time the whistle sounded the train was coming from the west, and did not go by until Apsey and his son had ridden upon the crossing; that they got to the crossing at the same time the train got there. They were driving on a slow gait,—a slow walk,—and continued to do so until they got clear to the train.

The next witness on the part of the plaintiff was Charles Slenou. He resided at Meridian, and was 18 years of age at the time of the trial. He was at the station at the time of the accident, July 7, 1888, and was loading a car with wood. The car stood at the west of the railroad crossing. He saw Apsey and his son approaching from the south. They were south of the track, and the train had not yet reached the crossing. They were at that time one or two lengths of the horse and buggy south of the crossing. The cars passed between the car in which he was and the point where he last saw Apsey and his son. The horse was going north. He saw the horse jump a little, sideways, and, after he had jumped, the back of the buggy was to him. He estimates the distance he was from the crossing at 35 to 40 rods.

The other witness for the plaintiff was Amey Carr. She resided at Meridian, and recollects the circumstances of the killing and death of Mr. Apsey and his son. She was standing in the south door of her father's house, which is north of the railroad crossing, on the east side of the highway. She testifies that she saw Apsey and his son as they approached the crossing that day; saw the horse and vehicle; that it was not moving very fast, and was walking, as she thought. She did not know how far the horse was south of the track when she heard the danger signal given, but she testifies it was not very far; that the horse must have been on the bridge, or near that, and was going towards the track at the time; that she

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could not state exactly where he was. She was 18 years of age at the time of the trial. At the time she heard the danger signal she was sitting in the dining-room, a short distance from the door, trimming a hat. When she heard the signal she arose, and went to the door, and then saw Apsey. The horse was coming towards her, and was near the plank of the bridge; and at the same time she saw the engine pass the depot, which is situated on the opposite side of the street from Mr. Carr's house, and further to the south. She further testifies that she thinks the horse was upon a walk at the time she saw it, although she cannot be sure, as the horse was coming towards her.

These were all the witnesses who testified as to the conduct of Apsey on behalf of the plaintiff. One other person saw the accident, and that was the engineer upon the train, Charles A. Bigelow. He testified that he had been a locomotive engineer for 17 years, and over. He was asked, upon cross-examination by plaintiff's counsel, what he did when he first saw these parties at Meridian that morning, when they were killed by his engine. He testified that he pulled the alarm whistle; that to the best of his judgment he was at that time back from the crossing 300 feet; that when he first saw them, and gave this alarm, he thinks they were nearly opposite the fence running east and west,—they might have been a little further to the south of the fence; that he could see the carriage, and the man and boy in the carriage; that they were driving towards the track, and appeared to be looking towards him; that, at the time he saw them, they were going very fast; that the horse was running or trotting very much faster than a walk, but how much he could not state,—they were going very fast; that when he first saw them he gave the alarm by blasts of the whistle, he could not say how many times; that he was

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sitting upon the right-hand side of his engine, and that Apsey and his son were approaching the track from the same side; that he endeavored to and did stop the train as soon as he could, using all the appliances at hand to do so; that, when he first saw Apsey on the day of the accident, he was making no attempt to stop his horse, as he could see, but he saw a motion of his hand as if he hit the horse with the lines, but, upon cross-examination, he was not sure whether Apsey, in raising his hand, did so for the purpose of whipping his horse with the lines, or whether he was about to make a move to escape from the buggy; that the last he saw of him was when the horse turned off, but whether he turned the horse to drive off in that direction, or the horse was frightened, and turned itself, he could not tell; that when he first saw them he should not think that they were in a place of danger, and, if the corner of the right-of-way fence was 45 or 46 feet away, they were in an apparently safe place; that he should think that a man might turn around there, but that he had never been up there; that, after he gave the danger alarm, the horse came down there; that whether he ran away down there, or whether they drove him down there, he came, and the horse was going fast. He further testified that when he first saw him, and gave the danger signal, he was a little south of the range of fence which bounds the right of way on the south of the company's grounds.

This is all the testimony there is in the case bearing upon the contributory negligence of the deceased. If, as the plaintiff's witnesses testify, the deceased, Mr. Apsey, the father, was driving upon that crossing upon a walk, and deliberately drove against the train at that gait, it would be such contributory negligence as would prevent recovery in this action; and if, on the contrary, he was driving his horse fast in an attempt to drive across the

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track before the train reached the crossing, he was likewise guilty of contributory negligence, which should prevent the plaintiff's recovery in this action. There is no testimony in the case showing that the horse was frightened, or that an attempt to stop him was made to let the train pass in front, and, in any view which can be taken of the testimony of the witnesses who saw the conduct of Mr. James Apsey, it appears that he was not in the exercise of that care and caution which under the repeated decisions of this Court it was his duty to observe in approaching and crossing a railroad track. This disposes of the case, and no attention need be given to the other errors assigned.

The judgment is reversed, and a new trial granted.

The other Justices concurred

CLARRIE A. APSEY, ADMINISTRATRIX, ETC., v. THE DETROIT, LANSING & NORTHERN RAILROAD COMPANY.

[See *ante*, 432.]

Contributory negligence.

When the testimony shows affirmatively that the party who is injured through the negligence of another was himself negligent, and that such negligence contributed to bring about the result complained of, and such testimony is neither conflicting nor contradictory, it becomes a question of law for the court to decide whether there is any fact disclosed by the testimony to go to the jury upon the question of contributory negligence.

Plaintiff applies for a rehearing. Submitted December

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23, 1890. Denied December 24, 1890. The facts are stated in the opinion in the main case, *ante*, 432.

Frank L. Dodge and *C. P. Black*, for motion.

Charles B. Lothrop and *R. A. Montgomery, contra.*

PER CURIAM. We have carefully examined the points, brief, and argument upon which a rehearing is asked in this case.

Counsel for petitioner assume that, because the word "east" in two places inadvertently crept into the opinion, this Court misapprehended the facts in the case. The opinion is not open to misconception. The fact is stated that the train was an east-bound train, and that it was claimed that Apsey's view of the approach was obstructed by an orchard, embankment, etc. It follows that such obstructions were west of the highway, and not east, as inadvertently stated. Corrections will be made in the opinion handed down.

The reversal of the judgment was based upon the contributory negligence of Mr. Apsey, as shown by all the evidence in the case. Counsel for petitioner insist that the question should have been submitted to the jury. When the testimony shows affirmatively that the party who is injured through the negligence of another was himself negligent, and such negligence contributed to bring about the result complained of, and such testimony is neither conflicting nor contradictory, it becomes a question of law for the court to decide whether there is any fact disclosed by the testimony to go to the jury upon the question of contributory negligence.

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ALEXANDER C. MCGRAW ET AL. v. RACHEL SOLOMON AND CHARLES R. HENRY.

Fraudulent purchase—Mortgage—Good-faith holder—Value.

Whatever the rule may be in the case of negotiable instruments, it is well settled that a conveyance of lands or chattels, as a security for an *antecedent* debt, will not operate as a *purchase for value*, or defeat existing equities; citing 2 Amer. Lead. Cas. (5th ed.) 233; *Stone v. Welling*, 14 Mich. 514; *Boxheimer v. Gunn*, 24 Id. 372; *Kohl v. Lynn*, 34 Id. 360; *Edwards v. McKernan*, 55 Id. 523.

So *held*, where a vendor, who had the right to rescind the sale for fraud on the part of the vendee, replevied the goods from a trustee of mortgagees whose mortgages were given to secure *bona fide* antecedent indebtedness, and who took the same without notice or knowledge of the rights of the vendor.

Error to Wayne. (Gartner, J.) Argued November 14, 1890. Decided December 5, 1890.

Replevin. Defendants bring error. Affirmed. The facts are stated in the opinion.

Henry & Cornville (*W. H. Simpson*, of counsel), for appellants, contended:

1. "The general rule is not disputed that when property is obtained through fraud, under color of a purchase, the vendor may rescind, and is entitled to demand and receive back the property on returning within a reasonable time what he has received and placing the vendee in *statu quo*. *Martin v. Ash*, 20 Mich. 166; *Wilbur v. Flood*, 16 Id. 40. But this case differs from ordinary contracts of purchase, in the fact that the party to whom the property has been delivered, and who now appropriates it, was in no manner connected with the fraud in the purchase; and as *personal* dishonesty is not charged upon her, the case must be decided upon the assumption that she has been guilty of none, and that the wrong has been on the part of

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her husband exclusively;" citing *Morrison v. Berry*, 42 Mich. 396.

2. The plaintiffs had no right to replevy the property, although Mrs. Solomon might have bought goods without intending to pay for them, after she had conveyed the goods to innocent third parties, as after the property had changed hands it was too late to rescind the sale; citing *Jones v. Disbrow*, Har. Ch. 104; *Carroll v. Rice*, Walk. Ch. 377; *Lyon v. Waldo*, 36 Mich. 357.

3. Even though Mrs. Solomon may have bought the goods without intending to pay for them, yet, by the sale and delivery of the goods to her, she became vested with their ownership, and had the right to dispose of them in any lawful way, unless before such conveyance the sellers rescinded the contract; citing *Pangborn v. Ruemenapp*, 74 Mich. 578; *Wilbur v. Flood*, 16 Id. 40; *Dunks v. Fuller*, 32 Id. 244; *Campau v. Van Dyke*, 15 Id. 379; *Hollister v. Loud*, 2 Id. 316; *People v. Bristol*, 35 Id. 28; *Moriarty v. Stofferan*, 89 Ill. 528; *Farwell v. Hanchett*, 120 Id. 573; Wells, Repl. § 331; 2 Pars. Cont. 780.

4. Mrs. Solomon had a right to mortgage the goods for a *bona fide* pre-existing indebtedness; citing *Dwight v. Lumber Co.*, 67 Mich. 507; *Olmstead v. Mattison*, 45 Id. 619; *Beurmann v. Van Buren*, 44 Id. 496; *Loomis v. Smith*, 37 Id. 595; *Jordan v. White*, 38 Id. 253; *Bank v. Chapelle*, 40 Id. 447; *Sweetzer v. Higby*, 63 Id. 22; *Hubbard v. Taylor*, 5 Id. 162; *Field v. Fisher*, 65 Id. 611; *Root v. Potter*, 59 Id. 498; *Root v. Harl*, 62 Id. 420.

5. The question whether Mr. Henry and the mortgagees were *bona fide* purchasers was for the jury; citing *Palmer v. Mason*, 42 Mich. 146; *Root v. Potter*, 59 Id. 506.

6. The court should have instructed the jury, as requested by the defendants, that the sale to and possession of Charles R. Henry was valid as against plaintiffs, unless it could be shown by them by a clear preponderance of evidence that the goods were fraudulently purchased by defendant Rachel Solomon from the plaintiffs, and that said Henry had knowledge or notice of the fraud or participated in it; citing *Bank v. Chapelle*, 40 Mich. 447; *People v. Bristol*, 35 Id. 28; *Andrews v. Fillmore*, 46 Id. 316; *Austin v. Dean*, 40 Id. 388; *Iron Works v. Bresnahan*, 66 Id. 501.

Conely, Maybury & Lucking (*M'Cutcheon & Elliott*, of counsel), for plaintiffs, contended for the rule stated in the opinion, citing the authorities therein cited.

LONG, J. This action of replevin was commenced in

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the Iosco circuit court, and subsequently transferred to the Wayne circuit for trial. On the trial the plaintiffs had verdict and judgment. Defendants bring error.

It appears that, in the fall of 1888, defendant Rachel Solomon, who was doing business at Oscoda and Escanaba, purchased from plaintiffs $2,700 worth of goods, of which goods $2,200 worth went to Oscoda, and the balance to Escanaba. The goods were shipped from Detroit on September 28. The rubber goods were payable on December 1, and the other goods were sold on four months' time from date of shipment. These goods were not paid for. It is claimed on the part of the plaintiffs that an order was made by Mrs. Solomon for goods, which the plaintiffs refused to fill, and that shortly thereafter Mr. Marks, the agent of Mrs. Solomon, came to Detroit and inquired why they could not have the goods, and then and there represented to the plaintiffs that Mrs. Solomon was good, and was worth over $40,000 over and above all liabilities. At that time and upon that representation the plaintiffs filled the order and shipped the goods. The plaintiffs, claiming to have discovered that the representations were false, at once rescinded the sale, and brought replevin for the goods, about $800 worth being found and taken under the writ.

At the time of the issuing of the writ of replevin, defendant Henry was in possession of the goods, claiming to hold them under a declaration of trust made by him, and a bill of sale executed by Mrs. Solomon to him. It appears that, prior to the sale of these goods by the plaintiffs, Mrs. Solomon had become indebted to various other parties, among whom were Edson, Moore & Co., of Detroit, and James E. Forrest. On November 15, 1888, Mrs. Solomon executed a chattel mortgage to Edson, Moore & Co. to secure this indebtedness, covering the entire stock of goods at Oscoda, for the sum of $4,979.03.

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On November 13, 1888, she also executed to James E. Forrest, a banker of Au Sable, a chattel mortgage on this stock for $14,750. At the time the bill of sale was made by Mrs. Solomon to defendant Henry, the declaration of trust was drawn up and executed by Henry, and the consent of Mrs. Solomon, James E. Forrest, and Edson, Moore & Co. indorsed thereon. The declaration of trust is as follows:

"DECLARATION OF TRUST.

"I, Charles R. Henry, of Au Sable, Iosco county, Michigan, the trustee named in the annexed bill of sale, do hereby declare the object and purpose of the trust reposed in me hereunder as follows:

"1. That the said conveyance of the property described in said bill of sale is made to me as trustee for the purpose of securing the payment of the sum of three thousand dollars ($3,000), due from Rachel Solomon, of Au Sable aforesaid, to James E. Forrest, and the sum of four thousand nine hundred and seventy-nine and 3-100 dollars due from the said Rachel Solomon to Edson, Moore & Co., of Detroit, Michigan; and I hereby declare that I receive the conveyance of the title and possession of the property aforesaid for such purpose and no other. The said sum of three thousand dollars is the same indebtedness due James E. Forrest, and referred to in a certain chattel mortgage executed October 15, 1888, by said Rachel Solomon to James E. Forrest, conveying the property described in said bill of sale with other property, said indebtedness being the note of three thousand dollars ($3,000) dated October 15, 1888, which matured this day, and referred to in said chattel mortgage. The said sum of four thousand nine hundred and seventy-nine and 3-100 dollars, due said Edson, Moore & Co. is the same indebtedness referred to in a certain chattel mortgage conveying the property in said bill of sale described, executed this day, and under which said Edson, Moore & Co. have this day taken possession of said property, which possession, upon the execution of these papers, is to be transferred to me, said Charles R. Henry, and the security under said bill of sale is given in lieu of said chattel mortgage to Edson, Moore & Co., and in lieu of said chattel mortgage to James E. Forrest to the extent

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of $3,000 of the amount secured thereby, to wit, said note of $3,000, dated October 15, 1888, and no further, to wit: Said chattel mortgage, after the execution of these papers, is to stand as security for the payment of the several notes secured thereby, other than said note of $3,000, and all of the provisions in other respects are to remain unchanged.

"2. I am to assume control of the property described in said bill of sale, and be responsible to said James E. Forrest and Edson, Moore & Co. to the extent that I assume the obligation hereby of paying the sums of money aforesaid due them, to wit: To James E. Forrest, $3,000, to Edson, Moore & Co., $4,979.03, and interest thereon at seven per cent. till paid, the same to be paid as follows: The expenses of said trustee in conducting the business of selling said property in the most advantageous way practicable, the interest of all concerned being considered, shall first be paid out of the proceeds of the sale of said property, and the balance of the proceeds of such sale to be paid by the said trustee monthly to said James E. Forrest and Edson, Moore & Co., in proportion to the amounts of their respective claims, until both shall be paid, when all of said Henry's claim to said property shall be discharged, and the remainder surrendered to whom shall be entitled to receive the same.

"3. I am to insure the property described in said bill of sale against loss or damage by fire to the extent of the indebtedness aforesaid due said Forrest and Edson, Moore & Co., and pay the cost of the same out of the proceeds of the sale of said property, and as a part of the expenses of disposing of said stock and property.

"CHARLES R. HENRY.

"Dated November 15, 1888.

"We hereby consent that the object and purpose of the execution of the annexed bill of sale is correctly stated and recited in the foregoing declaration of trust, and hereby agree to abide by said Henry's acts in carrying out the purposes aforesaid.

"RACHEL her X mark SOLOMON.

"JAMES E. FORREST.

"EDSON, MOORE & CO.,

"By E. G. STEVENSON,
Their Attorney in Fact.

"In the presence of
"JOE MORIENTHAL.
"HARRY SOMERFIELD.

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"In consideration of the security afforded me by the annexed bill of sale, and of the transfer of the possession of the property described therein to Charles R. Henry by Edson, Moore & Co., who have taken possession of the same under their chattel mortgage, I hereby agree and consent that the lien of said Henry under said bill of sale annexed shall be a prior lien upon said property to the chattel mortgage executed by Rachel Solomon to me October 15, 1888. J. E. FORREST."

Thirty-five errors are assigned. On the hearing of the case in this Court, it was intimated to counsel that the judgment would to affirmed. The impression upon the Court then was that Mr. Henry did not stand in the position of a *bona fide* purchaser. Upon a more careful reading of the record I am convinced that the Court was then right.

It cannot be questioned, and counsel scarcely deny, that a most stupendous fraud was practiced by Mrs. Solomon, and her husband and Mr. Mack, her agents, in the purchase of these goods, as well as the goods of other parties over this State and out of the state. The goods so purchased on time were taken to Oscoda and Escanaba, and the small store at Oscoda packed from floor to ceiling, the goods of different parties intermingled, and many of the goods concealed, or attempted to be concealed, in the attic of the store, the house, and in the barn, so that when search was made it was very difficult to select from the stock the goods bearing marks of the plaintiffs and separate them from others. In this effort no assistance was to be obtained from Mrs. Solomon or her husband, or agent Mack, but they constantly put stumbling-blocks in the way of the goods being found, and made false statements as to where good were stored. That the goods were purchased with no intent on the part of Mrs. Solomon and her agents to pay for them is too plain to need discussion. The evidence of

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the fact was submitted to the jury, and they properly so found.

Practically the only question is, was Mr. Henry a *bona fide* purchaser? There is but one answer to the question. He was not. He represented parties under the declaration of trust, as it is called, who had taken chattel mortgages upon these goods to secure antecedent debts. It is true that though the goods were purchased with no intent to pay for them, and there was such fraud in the transaction that the vendors had the right to rescind the sale and reclaim the goods, yet, if they had passed into the hands of one who had purchased without notice of the fraud, and for a valuable consideration, the vendors could not reclaim them. This doctrine is based upon the principle that the vendor is estopped to set up his title against the innocent purchaser, because he put his property into the hands of the fraudulent vendee, and clothed him with the *indicia* of ownership, whereby he has been enabled to put the innocent purchaser into a position where he would be injured if the original vendor were allowed to retake his own.

It is not contended here but that the debts for which the mortgages were given to Edson, Moore & Co. and James E. Forrest were pre-existing debts; but it is contended that Mrs. Solomon had a right to mortgage the goods to Edson, Moore & Co. and James E. Forrest for a *bona fide* pre-existing indebtedness, and, having done so, these mortgagees were in the position of good-faith purchasers. This rule for which counsel for defendants contend is not to be sustained upon reason or authority. In *Johnson v. Peck*, 1 Woodb. & M. 334, Mr. Justice Woodbury clearly states the principle. The case arose, as the present case, between a vendor of goods, who claimed to recover them by reason of the fraud of

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the vendee, and one who claimed to hold the goods under a chattel mortgage given by the vendee, the mortgage being given to secure a pre-existing debt. It was there said:

"One party had obtained credit by means not justifiable, and the other had parted with his property under false pretenses and averments which were material and untrue. It was right then, in law as well as equity, that such a purchaser should not profit by his own wrong, and that the seller and purchaser should in such case stand as if nothing had occurred between them. But when rights of third persons intervene in this class of cases they are to be upheld, if those persons purchased the property absolutely, and parted with a new and valuable consideration for it without notice of any fraud. Because, unlike the case of theft, the vendor here voluntarily parts with the possession of his property, and thus enables the purchaser to gain a credit, or to appear to be the owner and thus be bought of honestly. * * * If they buy absolutely, and for a new and full consideration, and without notice of the fraud in procuring the goods, they are to be protected in holding them. But if they have notice of the fraud, or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as holding the goods open to the same equities and exceptions as to title as they were open to in the hands of the mortgagor."

The doctrine is stated in 2 Amer. Lead. Cas. (5th ed.) p. 233, as follows:

"Whatever the rule may be in the case of negotiable instruments, it is well settled that a conveyance of lands or chattels, as a security for an antecedent debt, will not operate as a purchase for value, or defeat existing equities."

This principle has been recognized by this Court in *Kohl v. Lynn*, 34 Mich. 360; *Stone v. Welling*, 14 Id. 514; *Boxheimer v. Gunn*, 24 Id. 372; *Edwards v. McKernan*,

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55 Id. 523. Under the declaration of trust, defendant Henry stood in no better position than these mortgagees, whose claims he represented and was to pay out of the goods.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JAMES L. EDSON ET AL. v. JOSEPH L. HUDSON.

Vendor and vendee—Fraudulent purchase—Insolvency—Evidence—Good-faith incumbrancer.

1. Insolvency may always be submitted to a jury, with other facts, to show an intention to defraud in the purchase of goods.
2. While the mere fact of insolvency will not prevent a merchant from purchasing goods on credit with the good-faith intention of paying for them, and, standing alone, is not a badge of fraud, yet, in this case, such fact, coupled with the existence of a large mortgage on the vendee's stock of goods, and its concealment from the vendors, furnished some evidence tending to show fraud in the purchase of the goods from them.
3. The conveyance of chattels as security for an *antecedent* debt will not operate as a *purchase for value* to defeat existing equities, citing *McGraw v. Solomon*, 83 Mich. 442.

   So *held*, where a vendor, claiming a right to rescind the sale for fraud on the part of the vendee, brought an action of trover against a mortgagee, whose mortgage was given to secure a *bona fide* pre-existing indebtedness without any knowledge on his part of the alleged fraudulent purchase of the goods, or of any such claim on the part of the vendor, and which mortgage extended the time for payment of the debt for thirty days, but the mortgagee took almost immediate possession under the insecurity clause, and commenced selling the goods.

Error to Wayne. (Lane, J., presiding.) Argued November 11, 1890. Decided December 5, 1890.

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Trover. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson, for appellants.

Cutcheon, Stellwagen & Fleming, for defendant, contended:

1. Plaintiffs seek to rescind the sale on the ground of fraud, which must be clearly proved, and the inferences to be drawn from the facts must not only be consistent with the fraudulent acts charged, but inconsistent with the theory of honesty and good faith in the transaction; citing *Blish v. Collins,* 68 Mich. 542; *Campau v. Lafferty,* 50 Id. 114.
2. The Lull mortgage (not being filed) was absolutely void as against creditors; citing *Crippen v. Jacobson,* 56 Mich. 387; and therefore it in no way injured plaintiffs, and gives them no right of action, because there can be no fraud without damage; citing *Smith v. Rumsey,* 33 Mich. 183, 193.
3. Defendant's mortgage was given to secure a *bona fide* debt, and the mortgagor had a perfect right to give such a mortgage, or even to sell defendant his entire stock of goods to pay such a debt; citing *Whitfield v. Stiles,* 57 Mich. 410, 412; and defendant ratified the mortgage as soon as informed of its execution, thus making it take effect, for the purposes of this case, from the date of its filing; citing *Field v. Fisher,* 65 Mich. 606.

H. C. Wisner, for defendant.

MORSE, J. This is an action of trover to recover the value of certain goods sold by the plaintiffs to one William H. Smith, while he was engaged in business at Big Rapids, Mich. Mr. Smith was a customer of plaintiffs. At the time this suit was brought, he owed them the following bills sold at the dates given below:

June 26, 1888	$2 90
June 26, 1888	70 05
July 5, 1888	4 13
August 21, 1888	279 38
September 8, 1888	534 37
Total	$890 83

Mr. Smith made no representations as to his financial

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standing or responsibility when he purchased any of these goods. He simply ordered them, and they were forwarded to him without question.

On December 17, 1888, Smith put upon record in the city clerk's office at Big Rapids two chattel mortgages, one to A. A. Lull, of Pontiac, Mich., for $7,029.32, dated February 1, 1888, and one to the defendant, Joseph L. Hudson, for $3,060, dated December 15, 1888. These mortgages covered the entire stock of goods, fixtures, and furniture in Smith's store, and the Hudson mortgage was made second to the Lull mortgage. Hudson took possession of the store soon after the filing of his mortgage. It seems that L. G. Palmer, as attorney for Lull, took possession at first about December 19, 1888, and Hudson also, as he says, "was in secondary to Lull." Afterwards, it was concluded that Lull's mortgage was not good as to creditors who had sold goods to Smith between the date of its execution, February 1, 1888, and its filing, December 17, 1888, and thereupon Smith, on December 24, 1888, executed a new mortgage to Lull in the sum of $7,000, making the same subject to Hudson's mortgage This gave Hudson the first mortgage, but defendant testifies that Lull handed him the last Lull mortgage, "with a request that I would take it to Big Rapids and sell the stock under it, and I did so." Hudson sold all the mortgaged property, and realized therefrom the sum of $7,409.41 over all expenses, After deducting his claim, he offered the balance to Lull, who refused to receive it, and it still remains in defendant's hands.

On December 20, 1888, a traveling salesman in the employ of plaintiffs went into Smith's store at Big Rapids, then in the possession of the defendant under the first arrangement with Lull, and picked out, by the private cost and selling mark, a certain amount of goods, which he claimed were part of the identical goods sold by plaint-

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iffs to Smith under the bills heretofore mentioned. The value of the goods so identified and picked out was $453.-75. These goods were demanded of defendant, but he refused to deliver them over to plaintiffs. This suit is brought for the value of these goods.

The plaintiffs testified that they would not have sold the goods to Smith if they had known of this first $7,000 mortgage to Lull, which was in existence but not on file when they delivered the goods to Smith. No claim of any fraud on the part of Smith in purchasing these goods was made at first, but, on discovery of the date of the first mortgage to Lull, plaintiffs then insisted that they had a right to a return of the goods, and to rescind the sale, because they were purchased by Smith with a fraudulent intent. No fraud is charged against Hudson. It is admitted that his mortgage was for a *bona fide* debt. But testimony was given tending to show that Smith was insolvent at the time he purchased the goods of plaintiffs; and it is contended that this insolvency, coupled with the fact that he concealed from plaintiffs the fact that his stock was incumbered with a mortgage to Lull for $7,000, was sufficient to void the sale of the goods by plaintiffs to him on the ground of fraud in the purchase of them. And it is further contended that Hudson could not defend against plaintiffs' claim, as he could not be considered in law a *bona fide* holder or purchaser of the goods, for the reason that his mortgage was voluntarily given him by Smith, in payment of an antecedent debt, without any new consideration entering into the same. The circuit judge directed, at the close of the testimony, a verdict for the defendant, but for what reason the record fails to show.

The counsel for defendant contend that the mortgage to Lull cuts no figure in the case upon the question of

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fraud, because it was absolutely void as against the plaintiffs; that the mortgage could in no way injure them, and "gives them no right of action, because there can be no fraud without damage." But it must be remembered that plaintiffs testify, and undoubtedly truthfully, that they would not have sold the goods to Smith had they known that this mortgage of over $7,000 had been given. Withholding this mortgage from record, and keeping its existence a secret, on the part of Lull, was, as against the plaintiffs, a fraud upon them, and is so recognized in the law. It was at least the moral duty of Smith to acquaint plaintiffs with the existence of this mortgage at the time of his purchases from them; and we think that his silence in regard to it—his concealment of it—was legally an important circumstance to go to the jury, under all the facts shown, bearing on the question whether or not he purchased the goods with an intent not to pay for them.

The testimony tends strongly to show that he was insolvent when he bought the goods, and that he knew his liabilities largely exceeded his assets. While the mere fact of insolvency does not prevent a man buying goods on credit with the good-faith intention of paying for them, and, standing alone, is not a badge of fraud, yet, in this case, the fact of insolvency, coupled with the existence of this large mortgage, and its concealment from plaintiffs, furnished, in our opinion, some evidence tending to show fraud in the purchase of the goods from them; and insolvency may always be submitted to a jury, with other facts, to show an intention to defraud in the purchase of goods.

A letter from Smith to Hudson of date December 5, 1888, in which he sends a list showing how much less his sales were for the eight preceding months of 1888 than in the same months of the year before, and in which he

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says, "I am almost discouraged," also has some bearing upon this question of fraud. He further says in the same letter that "if I am crowded, will give you and Lull chattel mortgages to secure you."

If the question of fraud in the purchase of the goods should have been submitted to the jury, as we think it should, the only remaining question is whether, if such fraud were found, the defendant would be liable in this action. Plaintiffs' counsel claim that the circuit judge gave as a reason for directing the verdict for defendant that the mortgage from Smith to Hudson extended the time for the payment of the debt 30 days, and thus, the same being accepted and taken by Hudson as security for the payment of a *bona fide* debt, a new consideration was furnished, sufficient to defeat the plaintiffs' right of recovery, even if fraud was found in the purchase of the goods by Smith. The counsel contend that this reason is not a good one, because the mortgage was voluntarily made by Smith, and put on record by him, before Hudson had any notice or knew anything about it, and the extension of time in it cut no figure whatever in the transaction. Defendant's counsel claim that the mortgage from Smith to Hudson was taken by the latter as security for the payment of a *bona fide* debt, which mortgage the debtor had a perfect legal right to give. There is no doubt of this proposition in regard to such property as belonged to Smith. And a purchaser in good faith and for value, without knowledge of plaintiffs' claim to these goods, would hold them, as the sale to Smith was not void but voidable on account of the fraud, if any fraud there was, in the purchase of them. And until the plaintiffs rescinded the contract on the ground of such fraud, the title would be in Smith, who might dispose of them to innocent purchasers.

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The question here is whether the defendant, at the time the demand was made upon him, stood in the attitude of a good-faith purchaser. It must be conceded from this record that Smith was honestly indebted to defendant for the amount of the mortgage given him; that part of such indebtedness was past due; that the payment of such indebtedness was extended in the mortgage 30 days; and that Hudson had no knowledge whatever of any fraud practiced or any claim that fraud had been practiced in the dealings of Smith with the plaintiffs. But the extension of time can hardly be said to cut any figure in the case, as the defendant took almost immediate possession of the goods under his mortgage, which he was authorized to do, if he felt that he was insecure, by the terms of the same, and commenced selling the goods under such mortgage. In reality there was no extension of time as to the indebtedness.

It must be held under our previous decisions that Hudson was not a good-faith purchaser under his mortgage. It was given to secure a pre-existing indebtedness. It is well settled that the conveyance of chattels or lands as security for an antecedent debt will not operate as a purchase for value to defeat existing equities. See *McGraw v. Solomon, ante,* 442, and cases there cited.

It follows that the judgment must be reversed, and a new trial granted, with costs.

The other Justices concurred.

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THE PEOPLE v. HARRY B. BENNETT AND NORMAN H. WILLIAMS.

Nuisance—Municipal ordinance—Depositing refuse in public place.

1. Where a city ordinance prohibits the depositing of refuse matter in alleys, and also provides for its removal by the owner of the lot adjoining such alley within twenty-four hours after being notified so to do by the proper officer, a violation of the ordinance exists when the act prohibited is committed, which is not cured by a compliance with the order of removal, which is designed to secure the abatement of the nuisance created by such unlawful act.
2. A city ordinance prohibiting the accumulation by livery-stable keepers of more than two cart-loads of manure in or near their stables and stable-yards, during certain months, is held not to recognize their right to deposit manure in the adjacent alleys.

Certiorari to recorder's court of Detroit. (Chambers, J.) Argued November 11, 1890. Decided December 5, 1889.

Certiorari to review conviction of respondents under city ordinance for depositing manure in an alley. Affirmed. The facts are stated in the opinion.

Barbour & Rexford, for respondents.

Charles W. Casgrain and *Charles S. McDonald,* for the people.

CAHILL, J. A complaint was filed in the recorder's court of Detroit alleging that defendants on June 13, 1890, in an alley in the block bounded by Woodward and Grand River avenues and State and Griswold streets, did unlawfully and willfully throw, place, deposit, and leave in said alley manure and other substances, to the

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evil example of others, and contrary to the provisions of section 1, chapter 60 of the Revised Ordinances of 1890, which reads as follows:

"No person shall himself, or by another, throw, place, deposit, or leave in any street, highway, lane, alley, public place, or square, or in any private place or premises, any animal or vegetable substance, dead animal, fish, shells, shavings, paper, dirt, rubbish, excrement, filth, ordure, slops, unclean or nauseous water, liquor, or gaseous fluids, hay, straw, soot, offal, garbage, or any other article or substance whatever. In the case of any alley where any substance above named shall exist, be or have been deposited, it shall be the duty of every owner or occupant of any lot or premises, within twenty-four hours after having been notified by the superintendent of police so to do, to remove from the half of said alley adjoining such lot or premises all such substances."

The trial was had in the recorder's court before the Hon. Fitzwilliam H. Chambers, associate judge, without a jury, who found the respondents guilty, and ordered that they each pay a fine of $12.50 within 20 days, and, in default thereof, that they stand committed to the Detroit House of Correction until such fine and costs of commitment ($1) be paid, provided such terms of imprisonment shall not exceed 10 days. The record of such trial and conviction is brought to this Court by writ of *certiorari*, alleging that the judgment of the recorder's court is erroneous for the reason, among others, that there was an entire absence of proof warranting such judgment as to said defendants, or either of them. In return to said writ, all of the proceedings, including the testimony taken on the trial, are before us. It is urged against this conviction:

1. That, to sustain the conviction, it was necessary to show that the defendants had been notified to remove the manure from the half of the alley adjoining the premises occupied by them, and that they had neglected so to

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do for 24 hours after the receipt of the notice. No such notice was shown. But the prohibition of the ordinance is against depositing the objectional article in the alley at all, and a violation exists when the act prohibited is committed. The latter clause of the section is intended to accomplish the abatement of the nuisance, and a compliance with the order for removal would not relieve from a penalty incurred by a violation of the first part of the section.

2. It is claimed that section 1 has no application to defendants' case. The evidence shows that they are keepers of a livery stable, and that on June 31, 1890, when the alleged offense was committed, an inspection of their premises by the policeman who made the complaint, and by the other witnesses who were sworn for the people, showed that there were two piles of manure in the alley in rear of their premises, estimated by the witnesses at a couple of loads. There was no evidence on the part of the people as to how long the manure had been there. Section 6 of the same chapter of the Revised Ordinances is as follows:

"The keeper of any livery or other stable shall keep the stable and stable-yard clean, and shall not permit, between the first day of June and the first day of November, more than two cart-loads of manure to accumulate in or near the same at any one time."

It is said that the passage of section 6 indicates a clear purpose to except those engaged in the livery-stable business from the operation of section 1, so far as the depositing of manure in quantities not exceeding two cart-loads at one time is concerned; that there was no evidence tending to show any violation by the defendants of this section, even if they were charged in the complaint with a violation of it, which they were not. But it will be noticed that section 6 relates only to stables and stable-

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yards, and recognizes no right to deposit manure in alleys, and we do not think defendants can justify under that section.

3. Proof was received, under objection, to show that the manure piles were offensive to those occupying premises adjacent. I cannot see how this testimony was material; but as the case was being tried before the court without a jury, and the evidence was ample to justify the judgment, and was uncontradicted, I cannot see how it could have affected the result.

The judgment is affirmed.

The other Justices concurred.

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HENRY H. APLIN, AUDITOR GENERAL, v. W. B. & E. W. STILES.

Taxes—Warrant—Law of 1889—Title of act—Petition—Subpœna—Parties—Fraud.

1. The one *object* of the tax law of 1889 (Act No. 195, Laws of 1889) is to provide for the collection of the revenue of the State, whether uncollected at the time of its passage or to be levied and collected in the future, which object is fully expressed in the title.

2. Certain provisions of the tax law of 1889, for the sale of delinquent lands, are construed as follows:

a—The petition is filed against the land, and must pray a decree in favor of the State against the land.

b—No personal decree can be entered against the delinquent tax-payer, whether that term applies to the owner of the land when assessed or to the owner at time of filing the petition; and it is apparent that no purpose can be subserved by serving a subpœna upon the former.

c—The owner of the land at the time the petition is filed is a *proper* party, and it can be of no possible benefit or interest

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to him that his immediate or remote grantor be made a party. If he has a warranty deed, he may notify the grantor therein to come in and defend the action; but the State is only interested in the proceedings against the land.

3. A warrant for the collection of taxes is not fatally defective because addressed "to the treasurer of the township of——," if it is properly signed by a supervisor of a specified township, and is annexed to its tax roll; citing *Bank v. St. Joseph*, 46 Mich. 526.

4. Allegations in an answer to a petition filed under the tax law of 1889, that defendants' lands were assessed beyond their cash value, and that "said excessive assessment was fraudulent and void," is too general and insufficient to permit evidence of fraud. The specific acts which are claimed to constitute fraud must be set forth, and it should also be alleged whether the fraud was that of the supervisor or board of review.

5. An excessive assessment (valuation) of land is not sufficient evidence of corrupt and fraudulent conduct on the part of the assessor or board of review.

6. If the defendants, by their answer, had based a defense upon the fact that the board of review had increased their assessments over those fixed by the supervisor without notice to them, they might have brought themselves within the rule in *Avery v. East Saginaw*, 44 Mich. 587; but no such issue is made by the pleadings.

Appeal from Newaygo. (Palmer, J.) Argued November 12, 1890. Decided December 5, 1890.

Petition for sale of delinquent tax lands under Act No. 195, Laws of 1889. Defendants appeal. Affirmed. The facts are stated in the opinion.

George Luton, Prosecuting Attorney, for petitioner.

M. W. Underwood, for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

GRANT, J. This is a proceeding by petition, under the general tax law of 1889, Act No. 195 (3 How. Stat.

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p. 2936), for the sale of lands delinquent for the non-payment of the taxes assessed thereon for the year 1887.

Four objections are made to the validity of the proceedings:

1. The title to the act, and the law itself, embrace two objects, and are therefore in violation of section 20 of Article 4 of the Constitution, that "no law shall embrace more than one object, which shall be expressed in its title."
2. The court did not acquire jurisdiction by the service of its subpœna upon the defendants, who were not the owners of the land at the time the assessments were made.
3. The warrant does not show affirmatively to whom it is addressed, and is not addressed to the treasurer of any specified township.
4. The values placed upon the defendants' lands were excessive, and, for that reason, fraudulent and void.

The title to this act is as follows:

"An act to provide for the assessment of property, and the levy of taxes thereon, and for the collection of taxes *heretofore* or *herefter* levied."

The object of the law is fully expressed in the title, and complaint is made only that it is of a dual character, in that it provides for the sale of lands delinquent for past as well as future assessments. We see no force in the objection. The one object of the law is to provide for the collection of the revenue of the State. This object includes that which was uncollected at the time of the passage of the act, as well as that to be levied and collected in the future. The cases cited by defendants' counsel were all decided upon the ground that the titles to the acts therein considered made no reference to the taxes which had previously been levied, and that, therefore, the acts were prospective only. The title to this act was evidently framed with reference to those

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decisions, and has avoided this defect in the former acts.[1]

2. The second objection is purely technical, and without merit. The petition is filed against the land, and must pray a decree in favor of the State against the land. Section 52. No personal decree can be entered against the delinquent tax-payer, whether that term applies to the owner of the lands when assessed or to the owner at the time of filing the petition. Section 57. It is apparent that no purpose can be subserved by serving a subpœna upon the former. Section 53 provides that a subpœna shall issue directed to each delinquent tax-payer, directing him to appear and plead within a specified time, or, in default thereof, said petition shall be taken as confessed by such delinquent tax-payer. What sense in requiring a subpœna to be served upon one when a decree cannot be rendered affecting either him or his property? Certainly the owner of the land at the time of filing the petition is a proper party. It can be of no possible benefit or interest to him that his immediate or remote grantor be made a party. If he has a warranty deed, he may notify the grantor therein to come in and defend the action. The State is only interested in the proceedings against the land.

3. The third objection is ruled by *First Nat'l Bank v. St. Joseph*, 46 Mich. 526.

4. To the fourth objection there are two complete answers:

1. The allegation in the answer is too general and insufficient to permit evidence of fraud. The only allegation is that the lands were assessed beyond their cash value, and that "said excessive assessment was fraudulent

[1] *People v. Denahy*, 20 Mich. 349; *Auditor General v. Supervisors*, 36 Id. 70, 76; *Nester v. Busch*, 64 Id. 657; *Thomas v. Collins*, 58 Id. 64.

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and void." The specific acts which are claimed to constitute fraud must be set forth, and in this case it should also be alleged whether the fraud was that of the supervisor or the board of review.

2. The testimony offered was directed solely to show the excessive assessment. This alone is not sufficient evidence of corrupt and fraudulent conduct on the part of the assessor or board of review. If the defendants, by their answer, had based a defense upon the fact that the board of review had increased their assessments over those fixed by the supervisor without notice to them, they might have brought themselves within the rule in *Avery v. East Saginaw*, 44 Mich. 587. But no such issue is made by the pleadings.

Decree affirmed.

CHAMPLIN, C. J., CAHILL and LONG, JJ., concurred.

MORSE, J. I concur in the result.

HENRY H. APLIN, AUDITOR GENERAL, v. CATHERINE O'CONNOR AND EDWARD O'CONNOR.

Taxes—Law of 1889—Receipt of 50 per cent. in full payment—Reassessment.

The proviso of section 95 of Act No. 195, Laws of 1889, authorizing the receipt of 50 per cent. of the taxes on lands returned delinquent for the taxes of 1885, and previous years, in full payment and discharge of such taxes, applies whether such taxes have been *reassessed* or not.

Appeal from Wayne. (Reilly, J.) Argued November 12, 1890. Decided December 5, 1890.

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Petition for sale of lands delinquent for taxes, under Act No. 195, Laws of 1889. Petitioner appeals. Affirmed. The facts are stated in the opinion.

B. W. Huston, Attorney General, and *H. M. Duffield,* for petitioner.

James J. Atkinson, for defendants.

LONG, J. The Auditor General filed his petition in the Wayne circuit court in chancery, under the provisions of Act No. 195, Laws of 1889 (3 How. Stat. p. 2936), for the sale of the lands delinquent for taxes in Wayne county.

The defendants' lands were embraced within this list, and they answered the petition, alleging a tender to the county treasurer on October 21 and 26, 1889, respectively, of 50 per cent. of the amount of such taxes, interests, and charges, under the proviso of section 95 of said act. The court below found the tender sufficient, and decreed that upon the payment of such amounts the county treasurer should give his receipt, and that thereupon the tax and the lien thereof be satisfied and discharged. The Auditor General appeals from this decree. The proviso reads as follows:

"*Provided,* That the county treasurer at any time previous to the sale of any lands heretofore assessed for the taxes of 1885, and previous years, and which have been returned as delinquent therefor, and of which no sale has been made for any cause, is authorized and directed to receive in full payment and discharge of such taxes of the year 1885, and previous years, and the interest and charges thereon, 50 per cent. of such taxes, interest, and charges; or such payment of fifty per cent. of such taxes, interest, and charges may be made to the State Treasurer, at any time before the petition for the sale shall be sent to the county treasurer."

It appears that the two parcels of land were assessed

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for taxes for the years 1884 and 1885, respectively, and reassessed in 1886 and 1887. It is insisted by the learned counsel for the Auditor General that the proviso in section 95, which allows the satisfaction of such taxes upon the payment of the 50 per cent., does not apply to the taxes of previous years which have been reassessed. The argument is that the proviso above quoted does not apply to such taxes, for the reason that a reassessed tax is never a valid tax for the year in which it was originally assessed; that it is stricken from the tax roll because of some fatal irregularity which prevents its collection; that it is then reassessed upon the same land, and collected with the taxes of the then current year the same in all respects as taxes of that year, and, when it comes to the Auditor General's office, the law does not require it to appear as a separate item on the tax list. In view of these facts, it is contended that it is hardly to be presumed that the Legislature intended to include in the proviso of section 95 these lands upon which taxes have been reassessed; that such a construction would require the court to interpolate into or add to the proviso, "except that they may be satisfied by the payment of fifty per cent."

We do not see the force of this reasoning. The proviso clearly contemplates that the lands returned as delinquent for taxes for the year 1885, or any previous year, whether or not the taxes have been reassessed upon such lands thereafter in any year, may be relieved from the lien of such taxes by the payment of 50 per cent. of the taxes, interest, and charges. We do not think it a fair construction to except from the operation of this proviso those lands upon which the taxes have been reassessed. If that was what the Legislature intended, it would have been an easy matter to have used apt words to express such meaning, by an exception of all lands upon which

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the taxes have been reassessed in subsequent years. No such exception is made, and the statute bears no such construction.

The decree of the court below must be affirmed.

The other Justices concurred.

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HENRY H. APLIN, AUDITOR GENERAL, v. THE REGENTS OF THE UNIVERSITY OF MICHIGAN.

Taxes—Exemption—Michigan University—Public property.

Property held by the Regents of the University of Michigan in their corporate capacity is the public property of the State held by the corporation in trust for the purposes to which it was devoted, and is exempt from taxation under the first subdivision of section 3 of Act No. 153, Laws of 1885, which provides that all public property belonging to this State shall be exempt from taxation.

Appeal from Wayne. (Reilly, J.) Argued November 13, 1890. Decided December 5, 1890.

Petition for sale of lands delinquent for taxes, under Act No. 195, Laws of 1889. The board of auditors of Wayne county appeal from decree dismissing petition in so far as it refers to land of defendant. Affirmed, without costs. The facts are stated in the opinion.

Henry M. Duffield, for appellants.

A. C. Angell, for defendant.

CHAMPLIN, C. J. Prior to July 1, 1888, certain land situated in the city of Detroit, the title of which was vested in the Regents of the University of Michigan by

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a grant from Walter Crane, bearing date March 22, 1880, was and has since the date of such deed been held for corporate purposes. This land was assessed upon the general tax roll of the city for the year 1887, and was returned as delinquent, and the bill is filed in this case under Act No. 195, Laws of 1889 (3 How. Stat. p. 2936), to enforce collection of such taxes. No question is made concerning the title to the land, and the only question presented is whether the land was exempt from taxation.

The legislation affecting the organization of the University of Michigan is given in the case of *Regents v. Board of Education*, 4 Mich. 213, and need not be here repeated. Section 7 of Article 13 of the Constitution which was adopted in 1850 declares that—

"The Regents of the University, and their successors in office, shall continue to constitute the body corporate known by the name and title of 'The Regents of the University of Michigan.'"

Section 8 of the same article declares that—

"The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund."

By these provisions the body corporate, which was at first the creation of the legislative will, has received the sanction of the Constitution, and has become a part of the fundamental law, and in some respects is not subject to legislative control or interference. It is not, however, independent of, but is part of, the State, a department to which the education of the people in the higher branches of literature, science, and the arts is confided. As such it is fostered by the State. Appropriations are made which are raised by taxation upon the property of individuals of the State. A tax is also imposed of one-twentieth of a mill upon the taxable property of the State for the support of a university. The public

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character of the institution has been recognized and declared in repeated decisions of this Court. It was said in the case of *Regents v. Board of Education*, above referred to, that the corporation has been since its incorporation in 1837—

"A public corporation, created for public purposes alone. * * * The institution was erected and has been supported by a public fund, and the corporators have no private interest whatever connected with their corporate character." And again it was said that—"the corporation was created for the purpose of administering a great public trust, and the present plaintiffs are but trustees for the same great purpose."

In the case of *Regents v. Detroit Young Men's Society*, 12 Mich. 163, it was said:

"The University of Michigan is a public corporation. The people, in their political capacity, are the corporators. It is a part of the educational system of the State, and is under the control of the Legislature, except so far as it has been placed beyond the reach of that body by the Constitution and the trust attached to the university fund. * * * It was a public corporation originally, and has been throughout. It was created to subserve a great public want,—the education of the people."

Exemption from taxation is claimed under the provision of the first subdivision of section 3 of Act No. 153, Laws of 1885 (3 How. Stat. § 11692), which provides that all public property belonging to this State shall be exempt from taxation.

It is contended that all of the property of the University of Michigan is public property of this State within the meaning of the above exemption. We are of the opinion that the land in question is exempt from taxation under the terms of the above statute. The property held by the Regents of the University of Michigan in their corporate capacity is the public property of the

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State held by the corporation in trust for the purposes to which it was devoted.

It does not follow that the State can have no property except such as is in the control and at the disposition of the Legislature. The Legislature is not the State, but only a department of the State. All subjects of legislation otherwise than such as are excepted from their authority by the Constitution are within their jurisdiction and control. They have said that all public property belonging to the State shall be exempt from taxation. The public property belonging to the State includes the property of all public departments of the State; such as the Michigan University, the Reform School, the School for the Deaf and Dumb, the State prisons, the asylums, the Agricultural College, the State Normal School, and other public institutions supported by the State through taxation or by funds or property appropriated by public or private generosity for that purpose. It cannot be supposed that the Legislature would make large appropriations for the support of these institutions, or levy taxes for the same purpose, and then assess the property held by them in trust to carry out the same object for which such taxes are levied.

It is claimed by the solicitor for petitioner that the second subdivision of section 3 is the one applicable to the Michigan University, which exempts the personal property of library and scientific institutions incorporated under the laws of this State, and such real estate as shall be occupied by them for the purposes for which they were incorporated. We think it plain that the language of this subdivision cannot apply to the class of institutions above enumerated as exempt under the first subdivision. It refers to such institutions as are incorporated under the general laws of the State for library, benevolent, charitable, and scientific purposes, and not those

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institutions which may be regarded as departments of the State provided for in the organic law, or supported by direct taxation.

The decree is affirmed, without costs.

The other Justices concurred.

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HENRY H. APLIN, AUDITOR GENERAL, v. JOSEPH L. ROBERTS, AND SAME v. GEORGE F. REYNOLDS.

[Two cases.]

Taxes—Constitutional law—Equalization by board of supervisors.

1. It was competent for the Legislature to provide for the sale of lands delinquent for taxes assessed and returned prior to the year 1889, under the provisions of the tax law of 1889, which gives a new remedy, in the enforcement of which the rights of the tax-payer are protected, and he is given a day in court, with an opportunity to allege and show the invalidity of the tax.
2. A record of equalization which fails to show the *assessed* valuation of the several townships, and the amounts added to or deducted therefrom, if any, for the purposes of such equalization, is fatally defective, and *voids* the entire levy of taxes for the year in which it is made.

Appeals from Mackinac. (Steere, J.) Submitted on briefs November 12, 1890. Decided December 5, 1890.

Petitions for sale of lands delinquent for taxes, under Act No. 195, Laws of 1889. Defendants appeal. Reversed, and petitions dismissed as to lands of defendants. The facts are stated in the opinion.

James J. Brown, for petitioner.

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James McNamara, for defendants.

CHAMPLIN, C. J. Petitions were filed in these two cases to enforce the collection of taxes assessed upon certain lands returned as delinquent for the year 1887 in the townships of Newton, St. Ignace, and Moran, in the county of Mackinac.

Certain constitutional objections were raised to the law under which the collection of the taxes is sought to be enforced, but as such objections have been passed upon, and the constitutionality of the law sustained, in the case of *Auditor General v. Stiles, ante,* 460, such objections need not be noticed.

We think it was competent for the Legislature to provide for the sale of lands delinquent for taxes which were assessed and returned prior to the year 1889, under the provisions of the act of 1889. A new remedy is provided, under which the rights of the tax-payer are protected, and he is given a day in court, where he may allege and show the invalidity of the tax. End. Interp. Stat. §§ 285, 287.

In the case against Roberts all of the taxes were rejected except the State and county tax, and in the Reynolds case the township, highway, rejected taxes, and bridge taxes were rejected, by the circuit judge, and we shall notice only such objections as relate to the taxes not rejected. The Auditor General did not appeal. The objections to the State and county taxes are the following:

"1. The State and county taxes which are sought to be established as a lien upon said lands are invalid, for the reason that no action was taken by the board of supervisors in the year 1887 to apportion the same between the several townships, nor between the townships and city, of said county of Mackinac, and no such apportionment was made.

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"2 No authority was given by the board of supervisors for the year 1887 for levying any State and county taxes upon said lands, nor upon any lands in said county.

"3. No equalization of valuation of the real estate in said county was made by said board of supervisors during the year 1887.

"4. The said board of supervisors for the year 1887 voted to the sheriff of said county for said year a salary of $200, and to the register of deeds a salary of $200, without any warrant or authority of law, which items were embraced in the tax levy made or attempted to be made upon the lands for the taxes of 1887.

"5. The board of supervisors had no authority to order the assessment of the rejected taxes for the township of Newton."

We shall pass only upon the third objection. The testimony is all documentary except the oral testimony of one witness. The defendants sought to show that there was no equalization of the valuation of the several tax rolls of the county by the board of supervisors, and also that there was no apportionment of the State and county taxes among the several townships of the county, by introducing in evidence "the record of the proceedings of the board of supervisors of Mackinac county for the year 1887, commencing on page 94, and continuing continuously to and including part of page 101." The record introduced commences at the afternoon session on Thursday, October 20, 1887, and concludes on Saturday, October 22, 1887. Michael Hoban was sworn as a witness, and he testified that he was the clerk of Mackinac county during the year 1887; that he kept the minutes of the proceedings of the board of supervisors for the year 1887, and made up the record of the board. He testifies that the record introduced and read to the court is all the record there is of the equalization and apportionment by the board of supervisors of Mackinac county for the year 1887. The validity of the taxes in question, therefore, must stand or fall by the record introduced.

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All presumptions in favor of the existence of any other record are repelled.

Section 21, Act No. 153, Laws of 1885 (3 How. Stat. § 1169 *n*), is mandatory in requiring the board of supervisors at their October session—

"To examine the assessment rolls of the several townships, and ascertain whether the relative valuation of the real property in the respective townships has been equally and uniformly estimated. If, on such examination, they shall deem such valuation to be relatively unequal, they shall equalize the same by adding to or deducting from the valuation of the taxable property in any township or townships such an amount as in their judgment will produce relatively an equal and uniform valuation of the real property in the county, and the amount added to or deducted from the valuation in any township shall be entered upon the records. They shall also cause to be entered upon their records the aggregate valuation of the taxable real and personal property of each township of their county as determined by them."

These provisions of the law are jurisdictional, and lie at the foundation of the right of the board to decide whether a tax shall be raised under the law, and of the determination whether the taxes in question have been legally imposed. We have heretofore held that a neglect to comply with these requirements rendered the tax illegal and void. *Yelverton v. Steele*, 36 Mich. 62; *Boyce v. Sebring*, 66 Id. 210. The provisions requiring the determination of the board to be entered of record are equally mandatory. *Moser v. White*, 29 Mich. 59, 60; *Williams v. Mears*, 61 Id. 86. The record does not show the equalization. A resolution was introduced that the valuation of the different assessment rolls in the county for the year 1887 "be and they are hereby equalized, and the valuation of each fixed as follows, to wit." Then follows a list of the several townships, and the several wards of the city of St. Ignace, and opposite each a certain amount

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in dollars. This was amended by changing the amounts in several instances; but nowhere does it appear what the amounts of the valuation of each town and ward were as made by the supervisors, nor how much in any case was added to or deducted from the valuation as returned by the supervisor.

No tax can be held legal where there is such disregard of jurisdictional requirements. These requirements are for the protection of the rights of the property-owner. Every change in the valuation, as returned by the supervisor, affects the amount of tax he may be called upon to pay. If that valuation is reduced, he is affected beneficially, but other towns where no change is made are affected, and, if the valuation is increased, every taxpayer in that town is affected. This objection goes to the validity of the whole levy, and the taxes assessed against the lands referred to in the petitions filed by the Auditor General must be held invalid, the decrees of the court below reversed, and the petitions dismissed as to these lands.

The other Justices concurred.

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JAMES PEASE v. CHARLES H. MUNRO.

Bill of exceptions—Record—Index.

1. The practice of sending up the stenographer's notes as a bill of exceptions has been many times condemned by the Court.
2. In this case Supreme Court Rule No. 61, as amended July 2, 1890, is not complied with, in that no index to the record, or to the parts of the record to which the assignments of error apply, is furnished the Court; and the case having been twice

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tried, with a result adverse to the appellant on each trial, the judgment is affirmed.

Error to Lake. (Judkins, J.) Submitted on briefs November 13, 1890. Decided December 5, 1890.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Ransom Cooper (Will G. Fleischhauer, of counsel), for appellant.

Charles A. Withey, for plaintiff.

PER CURIAM. The plaintiff sued the defendant in justice's court for a balance claimed to be due him upon a contract for peeling and delivering the hemlock bark on a certain description of land in Lake county.

In the contract the plaintiff agreed to peel all the hemlock bark on the trees 12 inches in diameter, and upwards, on lands described in the contract, during the season of 1888, for which he was to receive 75 cents per cord when 50 cords were peeled and piled, and roads made to it; 75 cents per cord when piled on the track; 85 cents per cord when loaded on the cars; and 50 cents per cord at the completion of the contract. The plaintiff had been paid all except the 50 cents per cord payable at the completion of the contract. The defendant declined to pay this upon the ground that the contract had not been completed, and it was conceded on both sides that the plaintiff could recover only upon satisfactory proof that the contract had been fully performed. The plaintiff recovered a judgment in justice's court, and defendant appealed to the circuit, where the plaintiff again had judgment, and the defendant brings the case to this Court upon writ of error.

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The bill of exceptions appears to contain all the testimony taken upon the trial, including questions and answers, in some cases many times repeated, and no attempt seems to have been made in settling the bill of exceptions to aid this Court in getting at the exact questions involved. The practice of sending up the stenographer's notes as a bill of exceptions for us to examine has been many times condemned. This record contains nearly 200 pages, much of which ought to have been omitted. It is noticeable also that we are not furnished with any index to the record, nor to the parts of the record to which the assignments of error apply. This is a violation of Rule 61 of this Court as amended July 2, 1890 (74 Mich.); and to pass upon all the errors assigned would necessitate a great deal of unnecessary work, which this Court in the present state of its business is not able to undertake.

The case has been twice tried before a jury, and the plaintiff has each time recovered. We have read the testimony and the charge of the court, and see nothing to indicate that the case was not fairly tried in the circuit. If counsel desire us critically to examine the record for technical errors, we shall require them to follow, with strictness, the rules that are intended to aid the Court in such examination.

The judgment will be affirmed, with costs.

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JOSEPH BOURGET v. ROBERT DONALDSON ET AL.

Mechanic's lien—Notice—Proof of service—Assignment by contractor of amount due—Right of subcontractor—Costs.

1. An affidavit attached to a claim of lien filed in the office of the register of deeds, in which the deponent states that he served a true copy of the foregoing statement or claim of lien by "delivering the same *to him* personally," is *prima facie* proof that such service was made upon the owner of the land upon which the lien is sought to be enforced, who is named as such in such claim or statement, when offered in evidence in connection with the claim to which it is attached.
2. An assignment by a contractor, to a third person, of the moneys to become due upon the contract, with notice to the land-owner of such assignment, will not deprive a subcontractor of his lien upon the premises under the mechanics' lien law, but such lien will be limited in amount to the sum actually due and owing to the contractor from such owner at the time of filing and serving the notice of lien.
3. A land-owner who is compelled to appear and answer a bill filed by a subcontractor to enforce a mechanic's lien, and who discloses the exact amount unpaid on the contract, and proffers payment of such sum to the person who shall be adjudged entitled thereto,—the same being claimed by an assignee of the contractor,—is entitled to his costs.

Appeal from Wayne. (Hosmer, J.) Submitted on briefs November 14, 1890. Decided December 5, 1890.

Bill to enforce a mechanic's lien. Defendant Reid appeals. Affirmed. The facts are stated in the opinion.

George B. Yerkes (Hibbard Baker, of counsel), for complainant.

Barbour & Rexford, for appellant.

[1] The mechanics' lien law of 1887 was held unconstitutional in *Lumber Co. v. Loan & Trust Co.*, 77 Mich. 199.

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Angstman & Pitts, for defendant Donaldson.

LONG, J. Complainant, as subcontractor, and as assignee of one Vanderworp, another subcontractor, under defendant Dean, filed his bill of complaint, under the mechanics' lien law, to enforce a claim of lien on real estate owned by defendant Donaldson, making one Reid a party because he claimed the money due from Donaldson, under an assignment thereof from Dean, made prior to the filing of the claim of lien. The bill was taken as confessed by defendant Dean. Defendants Donaldson and Reid filed separate answers, to which complainant filed general replications. The decree is in favor of complainant for the full amount of his claim, and $18.25 costs, and awards to defendant Donaldson for his costs the balance ($18.25) of the amount owing by him. From this decree, defendant Reid appeals generally.

The facts are substantially as follows: Defendant Dean contracted with defendant Donaldson, owner of certain real estate in Detroit, described in the bill of complaint, to glaze and paint the house thereon for the sum of $350. On June 17, 1889, Dean was owing defendant Reid, a wholesale and retail dealer in glass and paint, over $500 for goods purchased. Dean wanted more goods on credit, and Reid refused to let him have them unless Dean would give some security for what he was owing, and for any further credit he might get; and, accordingly, on that day, for that purpose, Dean assigned to Reid the money to become due on the contract with Donaldson, of which assignment Donaldson, through his agents, A. C. Varney & Co., architects, had notice on June 19, 1889, and personally on November 5, 1889.

Complainant and one Vanderworp were employed by Dean to paint the house, and were each to be paid $2 a day. They worked 28 days, from October 4 to Novem-

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ber 5, 1889. They were each paid $8, and on November 5 there was due them from Dean $96; that is, $48 to each. On that day they refused to go on with the work because Dean would not pay them, and were informed of the assignment to Reid.

After the assignment, Dean brought to Reid a check for $150, given by A. C. Varney & Co., and, on Dean's representation that he needed $100 of it to pay the men working on the Donaldson job, Reid let him have $100, and gave him credit for the balance, $50. Subsequently, being informed by the architects that there was a balance of $150 to be paid, and that certain plate-glass was necessary to complete the work, Reid furnished Dean on credit $55.32 worth of plate-glass. Subsequently, on the representation of complainant and Vanderworp that Dean had not paid them, and that they would not go on with the work, Reid arranged with them to complete the same, and to pay them for the additional work. They accordingly completed the work, and Reid paid them therefor $51. Besides the $150, Reid received from Dean through the architects $50. Prior to the commencement of this suit, Vanderworp assigned his claim against Dean to complainant for the purpose of bringing suit thereon, and afterwards, on November 7, 1889, complainant caused a claim of lien to be filed in the office of the register of deeds for Wayne county.

The files from the register's office, copies of which are attached to the bill of complaint, were admitted in evidence, subject to defendants' objection as to their competency. The affidavit of service of the notice of lien upon defendant Donaldson, set forth in the bill and proofs, is as follows:

"STATE OF MICHIGAN, } ss.
"County of Wayne, }
"William Vanderworp, being duly sworn, deposes and

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says that on the 7th day of November, 1889, he served a true copy of the foregoing statement or claim of lien and notice by delivering the same to him personally.

"WILLIAM VANDERWORP.

"Subscribed and sworn to before me this 3d day of December, 1889.

"WM. H. TURNER,
"Notary Public, Wayne Co., Mich."

Defendant Reid, appellant, relies on the following as errors:

1. That the affidavit of service of the notice of lien is insufficient, and therefore fatal to complainant's right to recover.[1]

2. That, under the assignment from defendant Dean, defendant Reid is justly and legally entitled to all the money owing by defendant Donaldson on his contract with Dean.[2]

The statute requires that a copy of the notice of the claim of lien shall be served on the owner of the property upon which the lien is claimed (How. Stat. § 8378); and that, within 30 days after final cessation of his labors, the subcontractor shall file in the office of the register of deeds of the county in which the property is situated—

"Proof by affidavit of due service of notice of lien on such owner, * * * and, unless such affidavits are so filed, such lien shall cease and determine as to all persons except as to such owner." Id. § 8380.

It is contended that there is no evidence that a copy of the claim of lien was served on defendant Donaldson, the owner; that the statement in the affidavit, which is set out, that notice was served "by delivering the same to him personally" is not a statement that the notice of the claimed lien was served on the defendant Donaldson,

[1] Counsel cited, in support of this proposition, How. Stat. §§ 8378, 8380; *Roberts v. Miller*, 32 Mich. 289; *Wagar v. Briscoe*, 38 Id. 587.

[2] Counsel cited *Kane v. Clough*, 36 Mich. 486; *Bloomer v. Henderson*, 8 Id. 395; *Lauer v. Dunn*, 52 Hun, 191, 195.

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as the affidavit does not state who is meant by *"him personally."* The only proof contained in the record that such notice was served is found in this affidavit. The bill in the eighth paragraph alleges that complainant caused to be served a copy of such notice upon the defendant Robert Donaldson on November 7, 1889, "as appears by the affidavit of William Vanderworp, which, with a copy of said notice of lien, is hereto attached, marked 'Exhibit B,' and made part of this bill of complaint." This Exhibit B contains the affidavit heretofore set out. The defendant Donaldson in his answer neither admits nor denies the allegations contained in this paragraph of the bill, but leaves complainant to make proof. Defendant Reid also leaves complainant to make proof of those matters. The question is therefore presented whether the affidavit attached to the notice of lien is *prima facie* proof of the service of such notice.

How. Stat. § 8378, provides that "such lien shall not attach unless such person, contractor or subcontractor, labor or material man, shall file in the office of the register of deeds of the county or counties in which said real estate is situated a written notice, substantially in the following form." The statute then prescribes the form of such notice, and provides, as hereinbefore stated, for service of the notice upon the owner, etc. The form of the notice of lien was in substantial compliance with the statute. It contained the necessary statements, and the complainant testified on the hearing that it was filed in the office of the register of deeds of Wayne county on November 7, 1889. The files from the office of the register of deeds were offered and received in evidence, and Exhibit B, which is the statement of lien and notice with the affidavit of Mr. Vanderworp of service of such notice, was part of these files. These facts showed *prima facie*

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that the notice was served. It was attached to and indorsed upon the notice filed in the office of the register of deeds, and a fair construction of the words in the affidavit, "him personally," is that it was served on the defendant Donaldson. It is true that the notice would be utterly void without service upon the owner, as provided by the statutes, and no lien could otherwise be created and title to realty divested, yet it would be very technical indeed to hold that "him personally" could have possibly referred to any other than the defendant Donaldson, who is described in the statement filed as the owner of the land; and especially is this so where the parties have appeared and defended, and have made no such claim upon the hearing in the court below; for, so far as this record shows, no such claim was there made, and it appears to be raised here for the first time.

The cases cited by the learned counsel for the defendant Reid do not support the contention made by them on this point. In *Roberts v. Miller*, 32 Mich. 289, no answer was put in by the defendant. It was there said that the statute clearly contemplates that an answer shall be put in. The statute then in force (section 6790, Comp. Laws, 1871) provided—

"That no lien created by virtue of this act shall be binding upon the owner, part owner, or lessee until he shall have been notified of the filing of such lien with the register of deeds."

It was said by the Court further that—

"The petition is not *prima facie* evidence on the trial in support of the complainants' claim. The complainants must be prepared to support their own case, and must show that they have complied with all the requirements of the statute necessary to give them a lien upon the premises of the defendant."

It appears from this that the complainants offered no proofs whatever of such service, but relied solely upon

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the recitals contained in the petition filed to enforce the lien for the proof of the fact of service of notice. Here the defendants did appear and answer, and some evidence, as before stated, was offered and given that the notice had been served, at least, by the affidavit of service of the notice filed with the statement of lien in the office of the register of deeds. The affidavit is not open to the objection made.

The other objection goes to the whole merits of the controversy. The court below found—

"That on and prior to the 7th day of November, 1889, the defendant Robert Donaldson was the owner and in possession of the real estate mentioned and described in said bill of complaint; that on and prior to the 5th day of November, 1889, the complainant and one William Vanderworp, who assigned his claim to said complainant for the purpose of bringing suit thereon, furnished the defendant Robert Donaldson with certain work and labor in painting and decorating a certain dwelling-house, situated on said real estate; that said work and labor was commenced on the 4th day of October, 1889, and was concluded on the 5th day of November, 1889; that said work and labor was done and furnished in pursuance of an agreement between complainant and said William Vanderworp with the defendant Edgar S. Dean, a contractor employed by the defendant Robert Donaldson, under a written contract to do the painting and decorating on said building, for which said defendant Edgar S. Dean was to receive the sum of $350; that on said 7th day of November, 1889, there was due said complainant for said work and labor the sum of $96, and that on said day there was due to the said defendant Edgar S. Dean, under said contract to do the painting and glazing on said building, the sum of $132.50; that on the said 7th day of November, 1889, the complainant did cause a notice or claim of lien to be filed in the office of the register of deeds for Wayne county, and also a copy of said notice to be served upon the defendant Robert Donaldson, on said 7th day of November, 1889; and that there is now due the complainant, Joseph Bourget, the sum of $96, for which sum he is entitled to a lien upon the premises."

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A decree was entered for the payment to him thereof by the defendant Donaldson out of the moneys in his hands, and, if not paid within the 40 days, the premises were to be sold. The findings are fully supported by the proofs.

One of the claims made by the counsel for defendant Reid is that, after Donaldson was notified of the assignment to Reid, he became Reid's debtor, and therefore no lien could be placed on his property that could defeat Reid's right to the money.

How. Stat. § 8379, provides that—

"The filing and service of said notice shall not bind said premises and said owner * * * for any amount beyond the sum which is then due at the time of filing and serving the same, or which may thereafter become due from such owner."

Under the contention of counsel for appellant, the contractor could, at any time during the progress of the work, assign all his claim for such work to a third party, and, upon notice being given to the owner of such assignment, the subcontractor, to whom the lien is given under the statute, would be deprived of all the benefits which the statute was intended to confer upon such subcontractors. The statute cannot be given this construction. It is true that under the statute the subcontractor could only hold the premises under such a lien for the amount actually due and owing to the contractor from the owner at the time of filing and serving the notice of the lien.

In the present case, the defendant Donaldson discloses that he was owing the contractor, Mr. Dean, the sum of $132.50 at the time of such service, but that the amount was claimed by defendant Reid on the ground that the contract had been assigned by Dean to him. The moneys earned under the contract were still in Donald-

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son's hands, and the assignment of the same, or of Dean's interest in the contract, could not in any manner operate to defeat the right of the subcontractors to effectuate their lien under the statute. If the moneys had actually been paid over by Mr. Donaldson to Reid under Dean's orders, the case would have been very different. Then the contract on Donaldson's part would to that extent have been fully performed, and the subcontractors have lost all claim to the moneys so paid.

Some contention is made that Donaldson should not have had a decree for his costs. He was compelled to come in and make answer to the bill filed, and thereby put to cost and expense. He disclosed the exact amount unpaid, and now proffers payment of such amount to the person who the court shall adjudge is rightfully entitled thereto. The court properly awarded him his costs.

There is no error in the record, and the decree must be affirmed, with costs.

The other Justices concurred.

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NANNIE R. MACOMB, EXECUTRIX, ETC., v. ALBERT H. WILKINSON.

Mortgage foreclosure—Attorney's fees—Surplus—Bills and notes—Consideration—Principal and agent—Evidence—Day-book entries.

1. An entry in the handwriting of a deceased party, made in a day-book kept by him in his life-time in the regular course of business, is competent evidence; citing *Price v. Earl of Torrington*, 1 Smith, Lead. Cas. (8 Amer. ed.) 563, and notes.

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2. It is always competent to show the consideration for which a promissory note was given unless the rights of a *bona fide* purchaser have intervened.

3. The excess paid by a purchaser at a statutory foreclosure sale above the amount due, by reason of the addition of attorney's fees, belongs to whoever is entitled to the surplus arising on such sale, and cannot be claimed by the purchaser.

4. A principal is chargeable with such facts as are known to his agent.

So *held*, where an attorney at law, having funds to invest for a client, purchased for him a note with knowledge that a portion of the consideration for which it was given consisted of attorney's fees added to the amount claimed to be due on a statutory foreclosure, of which fact the client was ignorant, taking no part in the purchase of the note.

Error to Wayne. (Reilly, J.) Argued November 14, 1890. Decided December 5, 1890.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

E. S. Clarkson, for appellant, contended:

1. A payment on account is to be applied to the legal, not the illegal, items; citing *Warren v. Chapman*, 105 Mass. 87, 89; *Haynes v. Nice*, 100 Id. 327; *Rohan v. Hanson*, 11 Cush. 44.

2. In support of the alleged illegality of the attorney's fees, counsel cited *Bullock v. Taylor*, 39 Mich. 137; *Van Marter v. McMillan*, Id. 304; *Myer v. Hart*, 40 Id. 517; *Parks v. Allen*, 42 Id. 482; *Vosburgh v. Lay*, 45 Id. 455; *Louder v. Burch*, 47 Id. 109; *Millard v. Truax*, Id. 251; *Botsford v. Botsford*, 49 Id. 29; *Kennedy v. Brown*, 50 Id. 336; *Millard v. Truax*, Id. 343; *Damon v. Deeves*, 62 Id. 465; *Bendey v. Townsend*, 109 U. S. 665; and if the fees were illegal, the whole note was invalidated; citing *Buck v. Bank*, 27 Mich. 293; *Snyder v. Willey*, 33 Id. 483; *Brown v. McHugh*, 36 Id. 433; *Wisner v. Bardwell*, 38 Id. 278.

3. The whole amount of illegal attorney's fees should be deducted from the amount due on the note, as they could have been recovered from the payee in an action for money had and received; citing *Vosberg v. Lay*, 45 Mich. 455; *Kennedy v. Brown*, 50 Id. 336; *Klein v. Bayer*, 81 Id. 233.

4. Book entries are never admissible as evidence until they are regu-

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ularly proven; citing 1 Smith, Lead. Cas. (8th Amer. ed.) 570, 571, 573, 575; 1 Greenl. Ev. § 118 (note); and in this case no attempt was made to show that the book, or any entry therein, was reliable or accurate, nor was there any evidence to show when the entries were made, or that it was a book of original entry, or the genuine and only book of account of the deceased. Furthermore, Toms was not a party to the case at bar, and the entries were inadmissible as those of a third person, unless proven to have been made by him and at the time, and that he had no reason for perverting them; citing 1 Greenl. Ev. § 116; nor was it in any sense a shop-book, and hence was inadmissible as a whole or in part.

A. H. Wilkinson, in *pro. per.*, for appellant.

Robert T. Gray, for plaintiff, contended:

1. Oral evidence is inadmissible to vary the affect of a promissory note; citing *Kulenkamp v. Groff*, 71 Mich. 675.
2. As Baxter bid $200 more than was properly due, the presumption is that he paid the excess to the officer (*Millard v. Truax*, 47 Mich. 251), who is liable to refund it to the rightful owner: and the ownership of such excess is the personal right of the owner, and does not pass with the land; citing *Smith v. Smith*, 13 Mich. 258.

CAHILL, J. This suit involves the right of the defendant to show that a part of the consideration of a certain note given by him to R. P. Toms in his life-time consisted of illegal attorney's fees charged in the foreclosure of certain mortgages in the hands of Mr. Toms for foreclosure, and to have the amount of such illegal attorney's fees deducted from said note.

In January, 1889, John N. Macomb brought suit in the Wayne circuit against the defendant upon a promissory note, a copy of which appears in the record as follows:

"$1,500. DETROIT, November 3, 1876.

"Sixty days after date, I promise to pay to the order of R. P. Toms fifteen hundred dollars at First National Bank, Detroit, value received, with ten per cent. interest.

"A. H. WILKINSON."

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The note was indorsed as follows:

"I hereby assign and transfer the within note to John N. Macomb, of Washington, D. C.

"JULIA F. OWEN,

"Administratrix of the Estate of S. Caroline Toms."

In May, 1889, John N. Macomb having died, his death was suggested upon the record, and an order was made allowing his executrix, Nannie R. Macomb, to prosecute the suit.

The defendant pleaded the general issue, accompanied by the following notice:

"Take notice that, upon the trial of said cause, the said defendant will show and give in evidence that Robert P. Toms, the payee named in the note, a copy of which is given in the declaration in this cause, was attorney for one William H. Baxter in the foreclosure of two certain mortgages against one Frederick Schmidt; that this deponent, in order to protect his interest in the land included in said foreclosure, was compelled to give said note, and that said note includes about seven hundred dollars of attorney's and solicitor's fees, which were not authorized by law, and that such fees, and the amount thereof, should be deducted from said note at the date thereof, and the payments credited upon the note, so reduced in amount, as partial payments thereof."

The case came on for trial before the Hon. Cornelius J. Reilly, circuit judge, with a jury. The following facts were admitted on the record:

"1. That Bobert P. Toms died testate, March 10, 1884, bequeathing and devising all his estate to his wife, Sarah Caroline Toms.

"2. That Sarah Caroline Toms died intestate, June 17, 1888, leaving Julia Frances Owen, her sister, as her sole heir.

"3. That Julia F. Owen was duly appointed administratrix of the estate of Sarah Caroline Toms, and qualified as such administratrix."

The plaintiff put in evidence proof of the handwriting of Julia F. Owen, whose assignment of the note to John

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N. Macomb appears on the back of said note. Thereupon the note was admitted in evidence. The plaintiff also put in evidence tending to show that the interest had been paid on said note by defendant up to May 3, 1887. Mr. William J. Gray testified on behalf of the plaintiff that the note had come into his hands at the death of Robert P. Toms, by reason of his having been at that time in Mr. Toms' law-office; that he had made demand on the defendant for the payment of the note; that defendant had paid his interest at various times up to May 3, 1887; that he had made demand on him for payment of principal and interest; that defendant had at various times promised to pay principal and interest; that on two or three occasions defendant asked for delay; that witness told him that the note belonged to Col. Macomb, and that the latter was anxious to have his money, and close up matters in Detroit,—he wanted the principal and interest of this note paid; that defendant asked for delay, and promised on one or two occasions, if witness would delay suit, he would pay principal and interest; that, on the strength of defendant's promises to pay, witness delayed suit, and gave defendant more time than he asked for.

Plaintiff also offered in evidence certain entries in what purported to be the day-book kept by R. P. Toms in his life-time, and Mr. Gray was asked the following question:

"*Q.* Will you look at the entry there, Jan. 2, 1877? In whose handwriting is that entry?

"*Mr. Prentis.* I object to that as incompetent and immaterial.

"*Mr. Gray.* I only wish to show this entry in Mr. Toms' writing, showing payment and transfer of this note again to John N. Macomb.

"*Court.* I think I will allow you to show it.

"*Mr. Prentis.* I object to his proving the entries in any book in this way. It is not competent to prove the

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entries in a man's day-book in any such manner as this.

"*Court.* Note exception.

"*A.* This entry is in the handwriting of Robert P. Toms: 'John N. Macomb, debtor, to loan A. H. Wilkinson $1,525, by check No. 1,514, $1,525.' That note was afterwards laid in box belonging to Col. Macomb, and, after Mr. Toms' death, I informed Judge Wilkinson that the note belonged to Col. Macomb."

Error is assigned upon the admission of this entry from Mr. Toms' book. The purpose of it was to show by additional evidence that the note belonged to Mr. Macomb. As the proof was already ample on that point, and was undisputed, the entry in the day-book was scarcely necessary. But it was competent. The day-book was authenticated as one kept by Mr. Toms in his life-time; the entry was one of many made by him in the regular course of business, and comes within a familiar rule of evidence. *Price v. Earl of Torrington,* 1 Smith, Lead. Cas. (8th Amer. ed.) 563, and notes.

By way of defence to the note, it is claimed that it included six separate attorney's and solicitor's fees, charged on six separate foreclosures for installments of interest due on two mortgages given by one Frederick Schmidt, of Detroit, to William H. Baxter, of Vermont.

Defendant, Mr Wilkinson, being an attorney at law, had in his hands for collection a claim against Schmidt, which he put in judgment, and levied upon the property covered by the Baxter mortgages. At the time this levy was made, two foreclosure suits were pending in the Wayne circuit court, in chancery, to collect installments of interest due in the fall of 1874 on each of these mortgages. The defendant claims that to protect his levy he found it necessary to purchase the premises on these foreclosure sales, which took place December 9, 1875. The amount for which the premises were sold included a $100 solicitor's fee in each case, which he was

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required to and did pay as the purchaser at such sale. The property was sold subject to the balance to become due of the principal and interest on the two mortgages. He claims that he personally advanced the money to make these purchases, expecting that his client would reimburse him, but his client, becoming insolvent, was not able to do so, and he was required personally to take the property to protect himself.

Another installment of interest having fallen due on each mortgage in the spring of 1875, proceedings were commenced to foreclose for such installments by advertisement, and the sales made September 1, 1875; the amount claimed to be due in each case included an attorney's fee of $100, and the property was sold for such amount, Baxter being the purchaser. This sale was also made subject to the balance that was to fall due on the mortgages. There was no redemption from these two sales; but in September, 1876, after Baxter's title under the statutory foreclosure had become perfect, he conveyed the titles thereunder to Wilkinson, who paid the full amount of the bids and interest, including the $200 attorney's fees.

The third set of foreclosures, for interest due in the fall of 1875, were also statutory, the sales being held March 31, 1876. The property was bid in by Baxter for the full amount claimed, including $100 attorney's fees in each case. Wilkinson, as the owner of the equity of redemption, by arrangement with Mr. Toms, agreed to take the Baxter bids at the March sale, 1876, and on September 1, Mr. Toms sent to Mr. Wilkinson a statement showing the items of the amount claimed to be due at that date to be $1,781.78. For this amount Wilkinson gave his note to Mr. Toms for 60 days, and Mr. Toms remitted to Baxter the amount of such note, less the $200 attorney's fees and his disbursements.

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When that note fell due, to take it up, Wilkinson gave the note in suit for $1,500, and paid the balance of $312.98 in cash.

It is urged by plaintiff's counsel that none of the items of attorney's or solicitor's fees paid by Mr. Wilkinson on these various foreclosures can be by him offered as a defense to this suit. It is said that the $200 paid by him on the first foreclosure suits was as a purchaser, and, if the amount paid by him on such purchase was more than the amount due by reason of including the $200 solicitor's fees at the time, the excess could not be claimed by Wilkinson, but would belong to the person, whoever he might be, who was at that time entitled to any surplus arising from such sale; that the two items of $100, included in the second set of foreclosures, were paid by Mr. Baxter as the purchaser, and, if the sum bid exceeded the amount legally due by the amount of the attorney's fees, such amount remained in the officer's hands as a surplus, and belonged to whoever was entitled at that time to such surplus; citing *Millard v. Truax*, 47 Mich. 251.

So far as the first foreclosures are concerned, it is clear that the solicitor's fees paid by Wilkinson form no part of the note in suit, for the reason urged by plaintiff's counsel. As to the second foreclosure, no redemption was made or offered, and the bids ripened into titles in Baxter. When he conveyed these titles to Wilkinson, the fact that he included the attorney's fees as a part of the consideration demanded for a conveyance is of no importance. He was not bound to convey at all, and, if he did, he had a right to fix his own price. The consideration agreed upon and paid by Wilkinson was $1,108.84.

The last two items of $100 each, which were included in the sale that took place March 31, 1876, were included in the note given on September 1, of which the note in

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suit is a renewal. We have now to consider whether defendant is entitled in this suit to have this $200 so included in this note deducted from it as having been included without a legal consideration. No point was made by counsel for plaintiff on the trial, nor is any made here, that there was no legal evidence that such illegal items were included in the note of September 1, of which the note in suit is a renewal. Mr. Wilkinson was allowed, without objection, to testify to this fact, and was cross-examined fully upon the point by plaintiff's counsel. The effort on such cross-examination was directed to showing that the solicitor's and attorney's fees, in all the foreclosure proceedings except the last, had been settled for independently of the note of September 1, and that such note only included the attorney's fees on the last foreclosure. There is an intimation in the charge of the court that defendant's testimony, tending to show that the $200 attorney's fees was included in the note of September 1, was inadmissible, on the ground that it would have allowed defendant to testify to facts which must have been equally within the knowledge of Mr. Toms, who was the payee in the note, and who had since died.

If the testimony was objectionable on that ground, which we are not called upon to decide, it does not appear that the point was made by plaintiff's counsel on the trial, nor is it made here; counsel expressly stating that he prefers to rest his objection to the competency of such evidence upon the ground that it was evidence to contradict a written instrument, and, as such, was inadmissible. Counsel clearly misapprehends the purpose of the evidence. It was not intended to contradict the note, but to show the consideration upon which it rested. This may always be done unless the rights of a *bona fide* holder intervene. It is claimed that Col. Macomb was

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such holder. I think not. He never had anything to do personally with the purchase of this note. He had funds in the hands of Mr. Toms for investment, and the latter used a part of such funds to purchase this note, at what exact time it does not appear. Mr. Toms, the agent, knew that the note included the $200 illegal attorney's fees. Col. Macomb, as principal, was chargeable with knowledge of such facts as were known to his agent. *Baker v. Pierson*, 5 Mich. 456; *Emerson v. Atwater*, 7 Id. 12; *Terry v. Tuttle*, 24 Id. 206; *Advertiser & Tribune, Co. v. Detroit*, 43 Id. 116; *Taylor v. Young*, 56 Id. 285; *Morgan v. Railroad Co.*, 57 Id. 431.

Nor is the evidence clear that Mr. Toms transferred the note to Col. Macomb before it fell due. The only evidence to the point is the entry in Mr. Toms' day-book, under date of January 2, 1877, in which the note is charged to Col. Macomb as of that date. But he did not indorse the note to him at that time. Indeed, plaintiff's title to sue is acquired through a chain of transfers which does not recognize Col. Macomb as the holder of this note until after the death of Mr. Toms and his wife, many years after the note fell due. The defendant cannot be denied such defense to the note as was open between himself and Baxter, or between himself and Toms. That defense is that, as to $200 of the amount included in the note, there was no consideration except the illegal attorney's fees. The case should have been submitted to the jury on this theory. The payments of interest, and the promises to Mr. Gray to pay the principal, must go with defendant's explanation to the jury.

The judgment will be reversed, and a new trial granted.

The other Justices concurred.

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THE WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK v. E. GOLDEN FILER, ASSIGNEE, AND THE MANISTEE SALT & LUMBER CO. (IN THE MATTER OF THE PETITION OF RICHARD A. SEYMOUR.)

[See 80 Mich. 67.]

Vendor's lien—Waiver—Principal and agent.

1. A vendor's lien is waived *pro tanto* where the note of a third person is taken of the vendee for a portion of the purchase money; citing *Sears v. Smith*, 2 Mich. 244.
2. The president of a corporation engaged in the manufacture of salt and lumber purchased the interest of the vendee in a contract for the sale of timber, and gave him in payment his individual note for $7,000, and the note of the corporation for $3,000, and took an assignment of the contract in his own name. The papers nowhere mentioned the corporation as having any interest in the purchase. The president sold a half interest in the contract to a third party, which is held to indicate clearly that the purchase was his own; and the other facts stated are held insufficient to show that he represented the corporation in making the purchase.
3. The facts involved in this case are stated in *Bank v. Filer*, 80 Mich. 67, where the facts and law relating to petitioner's claim of a vendor's lien are fully discussed and stated.

Appeal from Manistee. (Judkins, J.) Submitted on briefs November 14, 1890. Decided December 5, 1890.

Petition for payment of claim against an insolvent estate. Petitioner appeals. Decree affirmed. The facts are stated in the opinion, and in 80 Mich. 67.

McAlvay & Grant, for appellant.

E. E. Benedict (*Uhl & Crane*, of counsel), for defendants.

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GRANT, J. The facts here involved were before this Court *In re Ortmann,* 80 Mich. 67. In that case, Ortmann, who was the owner of the land, and had made the contract for the sale of the standing timber, was held to have lost his lien.

The petitioner, Seymour, became the purchaser of that contract. He assigned it to one Engelmann. Engelmann sold a half interest in it to one Friend. Seymour received, as part of the purchase price, two notes, one made by Engelmann for $7,000, and one made by the Manistee Salt & Lumber Company for $3,000.

Petitioner contends that, in the purchase of this contract from him, Engelmann acted as and for the Manistee Salt & Lumber Company. This question was settled *In re Ortmann,* and we there held that Engelmann was the owner. The papers nowhere mentioned the company as having any interest in the purchase. The mere fact that Engelmann was the president of the company, or that he gave petitioner a draft of the company in part payment, is not sufficient to show that he represented the company in making the purchase. Besides, he sold a half interest to Friend, which is a clear indication that the transaction was his own. It follows, therefore, that petitioner took the $3,000 note of a third party in payment and not as security, and that his lien, if he had one, was discharged *pro tanto. Sears v. Smith,* 2 Mich. 244.

So far as the $7,000 note is concerned, which was the note of Engelmann, indorsed by petitioner, and delivered to Mr. Butler at the request of Ortmann, and received by him in payment, we do not think that petitioner stands in any better position than did Ortmann. He was evidently cognizant of the transaction between Ortmann and Engelmann after he had transferred the contract to

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Engelmann. He must have understood that Engelmann desired to obtain the title to the timber, discharged from any lien. The transfer by Engelmann to petitioner was dated September 24, 1887. September 27 Engelmann wrote a letter to Mr. Butler in which he says:

"I give you my own notes, as above, because I have bought the timber from Mr. Seymour. The title is in my name, and therefore let the transaction show for itself. Now, I want Mr. Ortmann to give me an absolute title of the timber as he has written, and extend the time for cutting it to 1890, as he promised Mr. Seymour."

On the same date, Engelmann wrote a letter to Ortmann in which he says:

"I have sent the notes as requested, to Mr. Butler, and asked him to get the bill of sale, and have time for cutting timber extended to 1890, which Mr. Seymour said you promised."

From these letters, and other facts in the record, it is manifest that neither Ortmann nor the petitioner, Seymour, contemplated the retention of a vendor's lien on the timber, but that they looked to the responsibility of the parties to the notes.

The attempt on the part of the petitioner to prove a parol recognition of the lien has been disposed of in the Ortmann case. The facts and the law in regard to this claim of lien were so fully discussed in that case that we consider any further allusion to them here unnecessary.

It appears that the note is still the property of Ortmann; that petitioner is only held upon it as an indorser, and that he has not paid it. He is not, therefore, in a position to claim the lien.

So far as the note for $3,000 is concerned, it appears to have been assigned by the petitioner as collateral security. He is therefore entitled to prove his claim as an unsecured creditor. When he shall have taken up the

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other note he will be entitled to prove that in like manner.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

JAMES B. SANFORD v. MARION R. PETTIT.

Chattel mortgage—Assignment—Bona fide holder—Sale—Fraud—Rescission—Principal and agent.

The owner of a stock of goods mortgaged them to secure an indorser, and the mortgage was filed in the proper office, after which he sold the goods, and agreed with the purchaser to secure a release of the mortgage. The purchaser secured the payment of a portion of the purchase price by a mortgage on the goods, which was assigned with his consent, and placed on file. The vendor informed the first mortgagee of the sale, and that the vendee desired to give another mortgage running a year, and have the first one released; to which the first mortgagee consented, and executed the release, with the understanding that he was to have the same interest in the new mortgage as he held in the one he discharged. He received a receipt showing the filing of such a mortgage in the proper office, but as a matter of fact the vendor procured and filed an assignment to him of the second mortgage. The vendee, claiming to have been defrauded in the amount and value of the goods sold him, sought to rescind the sale, and attached the goods, which were replevied by the first mortgagee, and on the trial of the replevin suit the vendee claimed that the vendor and assignee of the second mortgage were agents of the first mortgagee, and that he, being properly chargeable with their knowledge of the alleged fraud, was not a *bona fide* holder of the second mortgage and note. In affirming a judgment in favor of the plaintiff it is held:

a—The mere fact that the mortgage was given to the vendor, and by him assigned, and assigned by his assignee to the

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plaintiff at the request of the vendor, would not create such agency.

b—The court would have been justified in instructing the jury that there was no evidence in the case showing any such notice or knowledge on the part of the plaintiff of the alleged fraud as should put him upon inquiry as to the *bona fides* of the mortgage he was to take in place of the one he discharged, which was not due at the time, and in taking which the plaintiff could not be placed in any different position than that occupied by him under his first mortgage.

Error to Gratiot. (Daboll, J.) Argued November 19, 1890. Decided December 5, 1890.

Replevin. Defendant brings error Affirmed. The facts are stated in the opinion.

Earle & Hyde, for appellant, contended:

1. Bringing a suit in attachment to recover back consideration is sufficient evidence of a determination to rescind, and operates as a notice of rescission; citing *Graham v. Holloway*, 44 Ill. 385.
2. The only reason why the assignment of a mortgage becomes of greater validity in the hands of an innocent holder for value is that it secures a negotiable instrument, passing to the assignee of the mortgage by *indorsement* instead of by assignment; citing *Russell v. Waite*, Walk. Ch. 31; *Reeves v. Scully*, Id. 248; *Dutton v. Ives*, 5 Mich. 515; *Nichols v. Lee*, 10 Id. 526; *Redmond v. Stansbury*, 24 Id. 445; *Hull v. Swarthout*, 29 Id. 252, 253; *Robinson v. Wilkinson*, 38 Id. 301; *Judge v. Vogel*, Id. 569; *Matteson v. Morris*, 40 Id. 55; *Spinning v. Sullivan*, 48 Id. 5; *Minor v. Bewick*, 55 Id. 494.
3. The court erred in charging the jury that, if plaintiff had no knowledge or notice of the fraud, he was entitled to a verdict regardless of all other questions in the case, for the reason that this note did not impart negotiability to the mortgage, because it is expressly stated to be collateral thereto, and was assigned, instead of being indorsed, by Kneeland to plaintiff, who held it as indemnity for a pre-existing indorsement; citing *Boxheimer v. Gunn*, 24 Mich. 372; *Chadwick v. Broadwell*, 27 Id. 6; *Kohl v. Lynn*, 34 Id. 360; *Haescig v. Brown*, Id. 503.
4. Plaintiff did not release his mortgage upon the *credit* of the Wells mortgage, but upon Hughes' *promise* to procure a new mortgage from Wells, and this constitutes the difference

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between a *bona fide* holder for value and one without greater rights than Hughes Bros. had; citing *Barnard v. Campbell*, 58 N. Y. 73, and cases cited.

T. W. Whitney and *McGarry & Ford*, for plaintiff, contended:

1. The rule is well settled in this State that where a mortgage is given, accompanied by a negotiable promissory note, and both are assigned before due to a *bona fide* holder, he will not be affected by any prior equities; citing *Reeves v. Scully*, Walk. Ch. 248; *Dunton v. Ives*, 5 Mich. 515.
2. The mortgage in this case was accompanied by such a note, which was properly negotiated before due to plaintiff for the release of his prior mortgage, which was a valuable consideration, and there is not a scintilla of evidence in the case showing knowledge by or notice to plaintiff of the alleged fraud in the sale of the goods to Wells, nor is there any fact or circumstance which as a matter of law would put a reasonable man upon inquiry in that regard; citing *Tupper v. Kilduff* 26 Mich. 396; *Borden v. Clark*, Id. 412; *Helmer v. Krolick*, 36 Id. 371.
3. Admitting the right of Wells to rescind, has he done so? The contract was voidable only, and must have been rescinded within a reasonable time; citing *Campau v. VanDyke*, 15 Mich. 371; and this is a question of law where the facts are undisputed; citing *Holbrook v. Burt*, 22 Pick. 546; *Kingsley v. Wallis*, 14 Me. 57; and the vendor must be placed *in statu quo;* citing *Wilbur v. Flood*, 16 Mich. 45; *Lumber Co. v. Bates*, 31 Id. 159; *Carroll v. Rice*, Walk. Ch. 373; and the contract of sale cannot be set aside after third persons, like the plaintiff, have acquired rights thereunder; citing *Wright v. Peet*, 36 Mich. 213; *Whiting v. Hill*, 23 Id. 399; *Pullman v. Alley*, 58 N. Y. 637; *Paddon v. Taylor*, 44 Id. 371; *Railway Co. v. Kerr*, 49 Ill. 458; *Manfg. Co. v. Sammons*, 49 Wis. 316.

LONG, J. This is an action of replevin for a stock of hardware.

Defendant, as deputy-sheriff of Gratiot county, held the goods under a circuit court attachment, issued at the instance of Christian Wells against Hughes Bros. The plaintiff claimed the right to the goods under a chattel mortgage. The plaintiff resides near Ionia, Mich., and is the father-in-law of Fred Hughes, one of the firm of

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Hughes Bros. In 1888, the plaintiff indorsed several notes of the firm of Hughes Bros., at the First National Bank of Ionia, and, to secure himself against loss on such indorsements, took from Hughes Bros. a chattel mortgage upon their stock of goods at St. Louis, Mich. This mortgage was duly filed, and covered all their hardware in stock at that place.

Hughes Bros. met with several heavy losses in the spring of 1889. Among their creditors was Christian Wells, the real defendant in this suit. Wells called upon Hughes Bros., and in view of certain representations made by them as to the value of the stock, etc., which Wells claims were untrue, he was induced to purchase their stock and business. The indebtedness due to Wells at this time was $1,263. The stock was sold to him for $3,500, and in payment therefor he turned out the claim held by him, and gave back a chattel mortgage and his note to them for $2,237. A bill of sale was executed by Hughes Bros. to him. At the time this sale took place and the chattel mortgage was given, Wells was informed of the plaintiff's chattel mortgage, and refused to buy unless Hughes Bros. would procure its release, and they agreed to have this done. This arrangement was completed on February 15, 1889. Mr. Wells gave Fred Hughes a power of attorney to manage and carry on the business for him, and the business thereafter was carried on in the name of Wells.

On the day the mortgage was given to Hughes Bros., with the knowledge and consent of Wells, Hughes Bros. assigned it to Mr. Kneeland, a banker at St. Louis, and this assignment was duly filed. On February 25, 1889, and while the plaintiff's mortgage was on the property, Fred Hughes went to Ionia, and informed the plaintiff that they had sold the stock of goods; that the purchaser desired to have his mortgage discharged; and that he (the

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purchaser) desired to give another mortgage in place of it, the plaintiff to retain the same interest in the new mortgage he had in the old one. To this arrangement the plaintiff assented, and, in accordance therewith, executed a release of his mortgage, with the understanding that he should have an assignment of the Hughes mortgage; and on March 5, 1889, an assignment was procured to him from Kneeland of the mortgage given him by Wells. This assignment was duly filed.

On June 19, 1889, Mr. Wells, claiming to have discovered for the first time that he had been defrauded by Hughes Bros. in the amount and value of the goods sold him, claimed to rescind the sale, and brought suit against them in attachment, and took possession under his writ of all the goods. On the trial the defendant claimed—

1. That the sale from Hughes Bros. to Wells was fraudulent.
2. That Wells properly rescinded the sale.
3. That plaintiff, being properly chargeable with the knowledge of Hughes Bros. and Kneeland, was not a *bona fide* holder.

It was claimed upon the part of the plaintiff—

1. That there was no fraud in the sale.
2. That, admitting there was fraud, yet Mr. Wells would be precluded from contesting the plaintiff's lien, because the plaintiff was an innocent holder.
3. That Wells never rescinded the sale.
4. That, Wells having purchased subject to plaintiff's lien, which was released at his request, and the note and mortgage given by him having been substituted in lieu thereof, he was estopped from contesting its validity.

The case was tried before a jury, and certain questions of fact submitted for their determination by the court. These questions are stated shortly by counsel for plaintiff as follows:

"1. Was the sale fraudulent?
"2. If so, was such sale seasonable rescinded?

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"3. If so, was Sanford an innocent holder?

"4. Did Hughes or Kneeland act as Sanford's agent? If so, he was chargeable with their knowledge."

On these issues the plaintiff had verdict and judgment for six cents damages. Defendant brings error.

Twenty-five errors are assigned, but, as we view the case, none of them become important except the consideration of the question raised as to whether Sanford was a *bona fide* holder of the Wells mortgage. It is not claimed or pretended that the plaintiff was present during any of these negotiations, or that he had any knowledge that negotiations for a sale were going forward. He held a chattel mortgage on the whole stock, the validity of which is not questioned. It was a *bona fide* existing claim, and Mr. Wells was advised of it before he made the purchase. The first the plaintiff knew of the sale to Wells, so far as appears from this record, was on February 25, 1889, when Fred Hughes came to Ionia and informed him. His mortgage was then existing, and on file. The plaintiff testifies, and he is in no way contradicted, that Fred came to his place and told him he had sold his stock of goods, and the purchaser wanted to give another mortgage running a year, and wanted the old mortgage released; that he executed the release, and Hughes took it away, and was to have another mortgage made and sent to him in its place; that the arrangement was that the first mortgage was to be discharged, and a second one substituted for it; that he was to have no other or different interest in the second mortgage than he had in the first, and that was for what he was liable for at the bank as indorser for Hughes Bros. He afterwards got a receipt showing the filing in the town-clerk's office of such mortgage as Fred said had been given. It will be remembered that at this time the sale had been made to Wells, and the mortgage given back to Hughes Bros. by

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him, and with his consent assigned to Kneeland. On March 5 following Fred's interview with plaintiff, this mortgage and the note were assigned to plaintiff by Kneeland.

The court charged the jury that—

"No matter how much fraud was practiced between Hughes and Wells, no matter even though Wells rescinded the sale, unless you go further and find knowledge upon the part of Sanford (the plaintiff here) under the rules I have laid down as to what would be knowledge or notice to him, still, notwithstanding that fraud, you will still find for the plaintiff in this case, because if he has acted in good faith and honestly, and without such notice as would put him upon inquiry, so that he could investigate and find out about the fraud, he is entitled to your verdict, just as much as though there had been no fraud committed."

The only claim made upon the trial or made here of the knowledge of Sanford of such fraud or notice of it is that Hughes and Kneeland were the agents of Sanford, and their knowledge was the knowledge of Sanford, and notice to them would be notice to Sanford. We are unable to find any testimony in this record, or any circumstance connected with the whole transaction, that could lead to the conclusion that Hughes or Kneeland was the agent of plaintiff. The mere fact that the mortgage was given first to Hughes and assigned to Kneeland, and by him assigned to plaintiff, at the request of Hughes, would not create such agency. Mr. Wells claims that Hughes agreed to get this Sanford mortgage released, and that that was one of the inducements that led him to make the purchase and give his mortgage. Sanford cannot be charged with the fraud of Hughes. It is not a case where one has stood by and knows of such arrangement, or who has assented to it, and then comes in and claims benefits under his mortgage.

Under the facts shown upon this record the court went

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very far to protect the interests of Mr. Wells, and much further than the facts warranted. It would not have been error if the court had directed the jury that there was no evidence in the case to show that Sanford had any such knowledge or notice of the fraud, if any fraud was shown, as would have put him upon inquiry as to the *bona fides* of the mortgage he was to take in place of the one discharged by him; and that, under the circumstances shown, the knowledge of or notice to Hughes or Kneeland was not notice to the plaintiff. The mortgage and note taken were not yet due, and the plaintiff, in taking them, could not be placed in any different position than that occupied by him under his former mortgage, which was a valid lien, and of which Mr. Wells had knowledge at the time of his purchase.

The other questions become unimportant, and will not be discussed.

The judgment must be affirmed, with costs.

The other Justices concurred.

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CORNELIUS L. HARVEY AND HENRY J. HEYSTEK v. GEORGE R. FORD AND FRANK C. RATHBUN.

Partnership—Sale of interest by one partner—Chattel mortgage—Exemption.

1. One partner has the authority to execute a mortgage to secure partnership debts, and in so doing he binds all of his copartners.
2. How. Stat. § 7686, providing for exemptions, does not apply to chattel mortgages executed by one partner in the firm name, although his copartners may be ignorant of their execution.

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3. A bill of sale by one partner to a third person of all of his right, title, and interest in the partnership property, the vendee assuming the undivided firm debts, constitutes the vendee a partner with the other partner, who consents to such sale, and to the vendee's standing in the place of the vendor in the firm; and the fact that the parties did not then execute articles of copartnership, but agreed to do so thereafter, is not evidence of the non-existence of such partnership.

Error to Kent. (Grove, J.) Argued November 18, 1890. Decided December 5, 1890.

Replevin. Defendant Ford brings error. Affirmed. The facts are stated in the opinion.

Thompson & Temple, for appellant.

Fletcher & Wanty, for plaintiffs.

GRANT, J. On September 7, 1888, defendant Rathbun and one Alison D. Flory were partners, and carrying on business at Grand Rapids. On that day Flory sold to defendant Ford all his right, title, and interest in and to the partnership property, and executed a bill of sale of the same. Ford assumed the undivided firm debts. Defendant Rathbun indorsed his consent to this arrangement in the following language:

"I hereby consent to within sale from Alison D. Flory to George R. Ford, and consent to said Ford to stand in the place and stead of said Flory."

On September 10, defendant Rathbun executed to plaintiffs a chattel mortgage upon the goods and chattels of the firm in the name of Rathbun & Ford. Meanwhile some dispute had arisen between Ford and Flory, which it is unnecessary to detail, and in consequence thereof Rathbun also signed to said mortgage the name of Rathbun & Flory.

Plaintiffs brought replevin under their chattel mort-

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gage, for the purpose of foreclosing it. Two defenses are set up:

1. A denial of partnership.
2. That defendant Ford was entitled to an exemption of property to the value of $250.

The court below instructed the jury to find a verdict for the plaintiffs. By the writings above mentioned Ford became a partner with Rathbun. The fact that Rathbun and Ford did not then execute written articles of partnership, but agreed to do so thereafter, was no evidence that the partnership did not exist. The court below was correct in refusing to submit the question of partnership to the jury.

It is admitted that one partner has the authority to execute a mortgage to secure partnership debts. The act of the partner so doing binds all his copartners.

How. Stat. § 7686, providing for exemptions, does not apply to chattel mortgages executed by one of the partners in the name of the partnership, although his copartners may not be aware of their execution.

Judgment affirmed, with costs.

The other Justices concurred.

FREDERICK E. RICHARDS v. THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK.

Fire insurance—Occupancy of dwelling-house—Abandonment—Forfeiture of policy—Waiver.

1. A dwelling-house from which a tenant had removed with no intention of returning, although he had left some goods in the

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house which he did not need at the time for the purpose of housekeeping, and which remained so unoccupied for two days, when it was destroyed by fire, is held to have been *vacant* within the rule laid down in *Bonenfant v. Ins. Co.*, 76 Mich. 653, which question of vacancy, upon the facts stated, is held to have been one of law for the court.

2. In such a case a statement by an insurance adjuster to the assured that the company considered the house vacant, but were not going to be technical about the matter, being satisfied that he had sustained the loss, and an offer to pay $450 and cancel the policy, which called for $900, a sum less than the value of the property, will not amount to a waver of the right to forfeit the policy under a clause providing for such forfeiture in case the house became vacant or unoccupied.

Error to Jackson. (Peck, J.) Argued November 19, 1890. Decided December 5, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Thomas A. Wilson, for appellant, contended:

1. The question of vacancy should have been submitted to the jury; citing *Bonenfant v. Ins. Co.*, 76 Mich. 653; *Cummins v. Ins. Co.*, 67 N. Y. 260; *Eddy v. Ins. Co.*, 70 Iowa, 472; *Ins. Co. v. Tucker*, 92 Ill. 64.

2. A forfeiture is not favored at law or in equity, and the provisions for it in a contract will always be strictly construed; citing *Lyon v. Ins. Co.*, 55 Mich. 146; *Bonenfant v. Ins. Co.*, 76 Id. 653.

3. The building was insured with the understanding that it was occupied by a tenant, which became a part of the contract, and should be taken into consideration in construing the policy. The Court will take notice of ordinary business affairs, and that buildings occupied by tenants are liable to change occupants, and the defendant must be held to a like notice. It is unreasonable to suppose that the parties intended that the premises should be deemed vacant or unoccupied while the tenant was moving out, and retained possession to the exclusion of the plaintiff. The tenant had a couple of loads of household goods in the house, and retained the key, without notice to plaintiff, who had been directed by the local agent to notify him when the tenant's things were all moved out, and he would give a permit to let the house remain vacant for a time.

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4. The reasoning of some of the cases that the insurer is entitled to such care and supervision as occupancy gives, as a reason why actual occupancy should be required, can have no force with this Court; citing *Shackelton v. Sun Fire Office*, 55 Mich. 289; *Stupetski v. Ins. Co.*, 43 Id. 373.

5. Admitting that the house was vacant and unoccupied within the meaning of the policy, the conduct of the adjuster constituted a waiver on the part of the defendant; citing *Ins. Co. v. Davenport*, 37 Mich. 609; *Ins. Co. v. Kittle*, 39 Id. 51; *Ins. Co. v. Bowen*, 40 Id. 147; *Olmstead v. Ins. Co.*, 50 Id. 200; *Ins. Co. v. Garrett*, 42 Id. 289; *Carpenter v. Ins. Co.*, 61 Id. 635; *Marthinson v. Ins. Co.*, 64 Id. 372; *Cobbs v. Fire Association*, 68 Id. 463; *Cleaver v. Ins. Co.*, 71 Id. 414; *Mill Co. v. Ins. Co.*, 72 Id. 654.

Daniel A. Ferguson, for appellant.

Barkworth & Cobb, for defendant, contended:

1. In all the cases in which the policy has been held valid during temporary absence, there has been the intention to return and resume the interrupted occupation. This was the basis of both of the Michigan cases cited in plaintiff's brief, and in the Shackelton case the Court say that it is with some hesitation that the facts in that case are held to warrant the application of the principle; and the following cases show how closely the line is drawn: *Bennett v. Ins. Co.*, 50 Conn. 420: *Herrman v. Ins. Co.*, 85 N. Y. 162; *Whitney v. Ins. Co.*, 72 Id. 117; *Corrigan v. Ins. Co.*, 122 Mass. 298.

3. In the case at bar the occupancy had terminated. A mere privilege of storage remained, and this storage was all that prevented an *absolute* vacancy. The test of occupancy, as laid down by this Court, is absolutely absent, both in fact and in intention; citing *Marsh v. Bristol*, 65 Mich. 379; *Bonenfant v. Ins. Co.*, 76 Id. 653.

3. The most that can be said as to the statement of the adjuster is that it was an offer of compromise. Plaintiff was not misled, but understood that defendant denied liability, and would not pay the loss, but would give a moiety of the claim to secure the surrender of the policy without litigation. No action possible to plaintiff was thereby prevented, nor was he in any manner discommoded or impeded.

4. The claim that the plaintiff had a right to rely upon the local agent's statement as to when to get a vacancy permit is met by the fact that the policy provided that no agent of the company had power or authority to waive or alter any of the terms or conditions of the policy, or to make indorsements

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thereon (*Cleaver v. Ins. Co.*, 65 Mich. 527), and is within the principle of *Ins. Co. v. Hurd*, 37 Id. 11.

5. There can be no good reason why an insurer shall not have the full benefit of his contract rights in provisions as clearly reasonable as those providing against vacancy or inoccupancy, and a waiver ought not to be inferred from anything short of prejudicial conduct, or language which has misled the insured to his detriment; citing *Ins. Co. v. Fay*, 22 Mich. 467.

GRANT, J. This is a suit upon a policy of insurance to recover for a loss, by fire, of a dwelling-house covered by the policy.

The principal question in the case is whether the building was "vacant or unoccupied" so as to avoid the policy. The house had been occupied by a tenant of the plaintiff. The plaintiff had notified his tenant to vacate the house, which the tenant agreed to do and did. The tenant rented another house, and moved into it with his family two days before the fire occurred. Plaintiff lived about a mile from the house, and was informed that his tenant had left. The tenant left some goods in the house, but they were not such as he needed at the time for the purpose of housekeeping. He spoke to the plaintiff about leaving them there temporarily. The policy provided that it should be null and void if at any time the house should be or become vacant or unoccupied.

I think the house was "vacant," within the rule of *Bonenfant v. Insurance Co.*, 76 Mich. 653. It was there said: "Occupancy implies an actual use of the house as a dwelling-place." This dwelling-house had been abandoned, so far as any occupancy was concerned. The tenant had left, with no intention to return, and no other person was moving in to take his place. The contract of insurance was violated, and thereby rendered null and void. The occupancy provided for in the contract of insurance had

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ceased. This was not a question of fact for the jury. The facts were undisputed. The question was therefore one of law for the determination of the court.

It is insisted by the plaintiff that the defendant waived its right to make this a defense. The policy provided that no other than the superintendent of the western department of the defendant at Chicago should have power or authority to waive or alter any of the terms or conditions of the policy, and that all the agreements by the superintendent must be signed by him. No waiver, written or verbal, by this superintendent, is claimed. Upon being informed of the loss the adjuster and general agent for Michigan, by appointment, met the plaintiff, who told him about the removal of the tenant from his house. Plaintiff testifies that the adjuster replied:

"We consider it vacant, but we are not going to be technical about the matter. We are satisfied that you had the loss. I will pay you $450, and cancel your policy, if you will take it."

The policy was for $900, and the property was worth considerably more than that. Plaintiff declined to accept the proposition, when the adjuster again said:

"Well, think of it two or three weeks, and, any time you conclude to accept this offer, write to me, and I will cancel your policy, and pay you $450."

This did not constitute a waiver. A man may, without prejudice to his rights, offer to buy his peace. This offer of compromise was inadmissible in any aspect of the case. The solemn and deliberate contracts of parties cannot be set aside by such offers. The language used by the adjuster contained no admission of liability on the part of the defendant. Plaintiff's rights under the contract were not prejudiced or injured by this conversation.

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He lost nothing by it, and was not thereby induced to forego any of his rights under the policy. The circuit judge, therefore, properly instructed the jury to render a verdict for the defendant.

Judgment affirmed, with costs.

The other Justices concurred.

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IN THE MATTER OF THE ASSIGNMENT OF THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY. APPEAL OF WILLIAM BLACK.

Insolvent estates—Labor debts—Precedence.

1. Services rendered by a practical miller at a monthly salary and expenses, for a corporation engaged in the manufacture and sale of flouring-mills and milling machinery, in going from place to place after sales were made, and putting the machinery in running order, and giving it a trial to see if it performed the contract of sale satisfactorily, are held to be *labor* performed for the corporation, within the letter and spirit of Act No. 94, Laws of 1887, which prefers *labor* debts due from insolvent debtors.
2. Act No. 94, Laws of 1887, which prefers debts due for labor performed for insolvent debtors, creates no new liabilities, but merely regulates the distribution of insolvent estates.
3. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

   a—In cases which have come before this Court wherein a liability was sought to be enforced against stockholders for labor performed for the corporation, a restricted construction of the meaning of the word "labor" has been adopted, under the well-known rule that a surety is only liable according to the strict terms of his undertakings.

   b—In *Brockway v. Innes*, 39 Mich. 47, it was held that the services of an assistant chief engineer of a railroad company in

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constructing its road were not labor performed for the corporation, within the meaning of section 7 of Article 15 of the Constitution, which makes stockholders individually liable for all such labor.

c—In *Peck v. Miller*, 39 Mich. 594, it was held that stockholders occupied the position of sureties to the corporation with respect to liability for labor debts, and that courts cannot enlarge a surety's liability beyond the plain terms of his suretyship, and that railroad contractors were not within Comp. Laws of 1871, § 2412, making stockholders individually liable to an amount equal to their stock for all labor performed for the company.

d—In *Railroad Co. v. Sturgis*, 44 Mich. 538, it was held that under Comp. Laws of 1871, §§ 2393–2395, providing for the protection of laborers and persons furnishing material for the construction and repairing of railroads in this State, a distinction is clearly marked between those who contract *for* labor and materials and the persons who actually perform the labor and actually furnish materials. The law limits its protection to the one who labors, and does not lend it to the one who merely hires out the labor of others.

e—In *Jones v. Avery*, 50 Mich. 326, it was held that a claim for services performed by a traveling salesman hired at an annual salary of $1,000 was not a labor debt, within the meaning of the Constitution, and hence a stockholder was not liable for it.

Appeal from Wayne. (Hosmer, J.) Argued November 19, 1890. Decided December 5, 1890.

Petition to declare a debt due the petitioner for labor a preferred claim against an insolvent corporation, under Act No. 94, Laws of 1887. Petitioner appeals. Reversed, and prayer of petitioner granted. The facts are stated in the opinion.

Eugene Pringle, for petitioner.

Thomas A. Wilson, for receivers.

[The points of counsel are fully stated in the opinion, where many of the authorities are reviewed.—REPORTER.]

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CHAMPLIN, C. J. This appeal is from an order of the circuit court for the county of Wayne, in chancery, adjudging that the claim of petitioner was not entitled to preference as a debt owing to him for labor under the provisions of Act No. 94, Laws of 1887 (3 How. Stat. pp. 3789, 3790).

The George T. Smith Middlings Purifier Company is a corporation, and prior to January 14, 1890, was extensively engaged in building flouring-mills and in the manufacture and sale of milling machinery, and on that date it was insolvent, and made a common-law assignment. The petitioner had been in the employment of the corporation for several months, and was still in its employment when it made the assignment.

The petitioner filed proof of his claim February 19, 1890, which amounted to $2,527.23, consisting of two items, one for traveling expenses of $32, and the other for a balance due him for work and labor, performed by him for the company between August 11, 1887, and the date of the assignment, for the sum of $2,495.23. In the proof of his claim he claimed to be entitled to a preference over all other creditors not of the same class with himself, except such, if any, as may have valid liens antedating the time when he rendered his services, or some part thereof, for the portion of his claim asserted to be for work and labor. He soon afterwards filed the petition shown by the record, which was answered by the assignees. These proceedings were originally in Jackson county, whence the assignment proceedings were removed by the order of a circuit judge to Wayne county, carrying, as was assumed by both parties, these proceedings with it.

The petition, answer, and testimony show that Mr. Black was in the employ of the insolvent corporation about two years and five months before the assignment, at

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the wages or salary of $125 per month, and expenses, and that there were due to him at the time of the assignment the sums mentioned in his proof of claim. The main question to be considered is whether the character of his employment supports his claim to a preference, for the labor debt included, under Act No. 94, Laws of 1887. The evidence is that he was a practical miller of about eight years' experience in 1887, who knew no other trade, and had never pursued any other occupation; that his work for the corporation was at his trade at such places as he was from time to time sent by its executive officers; that the ordinary occasion of his employment was to start new mills or new machinery built or put in by the corporation, with a view to show to owners the practical results in the yield of flour from wheat, and of flour of the grades and quantities which the mill or machinery had been contracted to produce; that his services were such as could have been as well performed by any competent miller equally familiar with the same machinery; that the main purposes of his employment were, while incidentally showing to the employés of the owners how the mill or machinery should be operated, to hasten and procure the acceptance of mills and machinery, and to ascertain the exact facts upon which owners might claim damages or recoupments to reduce contract prices; and that the business in which he was so employed was severe manual labor, in performing which he applied to his work the results of his observation, knowledge, and experience as a miller, and of the skill which he had acquired while working at his trade.

The answer to the petition put in by the assignees, who have since been appointed receivers, contains the following admissions:

"8. They admit that the petitioner is by occupation a practical miller, and that his services for said corpora-

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tion were in connection with his said occupation at such places as directed by the officers of said corporation.

"9. That he was sent to many different parts of the United States for the purpose of starting new mills which had been built by said corporation, or new machinery which it had put into mills, with a view to show the owners the practical results in the yield of flour from wheat, and the grades and qualities of flour which the mill or machinery had been contracted to produce, and that such services could have been as well performed by any competent miller equally familiar with the same machinery.

"10. That the business of petitioner was similar in character to that of any head miller employed in running mills equipped with machinery of said corporation; and charged that, while he may have performed some manual labor, his compensation was largely for his skill and experience in the business, and as an expert."

The character of the work is thus described by appellant. He testified:

"When I arrived at a place where they were building a mill, as a rule, the mill was incomplete,—not ready for operation. I always started in and put belts on, on the different machines, on the machinery; put cloths on, on the bolting reels and wipers, and worked around the machines, to lubricate the rolls and the machinery or anything else; got everything in shape, and worked along ready for starting. After I got the mill in operation, we commenced to do our milling work, manufacturing flour and running the mill as a miller, until such time as the mill produced the necessary flour, according to contract, and filled it. After that had been done, and I got a written acceptance of the mill, that finished my work at that place."

The law under which the preference is claimed reads as follows:

"SECTON 1. *The People of the State of Michigan enact,* That all debts which shall be owing for labor by any person or persons or corporation at the time he, they, or it shall become insolvent, shall be preferred claims against the estate of such insolvent debtor or debtors, and have precedence in the payment thereof over all debts owing

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by such insolvent debtor or debtors, at the time of becoming insolvent, which shall not have become a lien on such estate, or some portion thereof, prior to the performance of the labor for which such debts for labor shall be owing." Act No. 94, Laws of 1887 (3 How. Stat. § 8749 *m*).

Was the debt in this case owing for labor, within the meaning of the statute? The question mainly depends upon the construction which should be placed upon the term "labor," as used in the statute. If the Court shall adopt a liberal construction, then the services performed by the petitioner would come within the signification of "labor," entitling him to a preference. But if a strict construction is adopted, and a limited meaning shall be placed upon the word "labor," as used in this statute, then the services rendered may be excluded from the benefits of the statute. In cases which have come before this Court wherein a liability was sought to be enforced against stockholders of corporations for labor performed for such corporations, this Court has adopted a restricted construction of the meaning of the word, according to the well-known rule that a surety is only liable according to the strict terms of his undertaking. The Court held in this class of cases that stockholders stood in the relation of sureties to the corporation with respect to liability for labor debts. In *Brockway v. Innes*, 39 Mich. 47, this Court held that the services of an assistant chief engineer of a railroad company in constructing its road were not labor performed for the corporation, within the meaning of section 7, Art. 15, of the Constitution, which makes stockholders individually liable for all labor performed for such corporation. In deciding this case, the Court said:

"No doubt the term 'labor,' in some extended senses, will include every possible human exertion, mental and physical, and in that broad signification it would be hard

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to find any case which would not come within the law. But inasmuch as the provision is manifestly designed to be exceptional, we must apply to it the ordinary meaning which is in common use, and which it must be presumed the people understood when they voted on the Constitution. Doubtless the precise line between what is commonly called 'labor' and other employment cannot be drawn with absolute precision. But we feel very sure that the position of an assistant chief engineer would never have been classed as that of a laborer, nor his work as labor, in the popular sense. It is mostly direction and scientific work, involving much more superintendence than personal exertion in manual labor."

This case, among others referred to below, is relied on by counsel for the assignees as governing this case. But the distinction between the services performed by an assistant chief engineer of a railroad and the petitioner, as shown by the testimony in this case, is apparent. They are not at all analogous in character. The one is mostly direction and scientific work; the other manual labor, and practical demonstration in the operation of machinery to produce the required result,—the performance of such services as are usually performed by the head miller in a flouring-mill. No one, I suppose, would deny that the head miller in a flouring-mill did perform manual labor, or such labor as the statute prefers in case of the insolvency of an employer.

In *Peck v. Miller*, 39 Mich. 594, this Court again held that stockholders occupied the position of sureties, and that courts cannot enlarge a surety's liability beyond the plain terms of his suretyship; and in that case it was held that contractors for constructing a line of railroad were not within the statute of 1871, making stockholders individually liable to an amount equal to their stock for all labor performed for the company. In deciding the case it was said, in speaking of the constitutional provision above referred to, that—

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"We can get very little assistance from adjudged cases in construing this language of the Constitution. But there can be no doubt, we think, that the main, if not the only, object of this provision was to secure the claims of laborers whose wages are not usually very large, but whose means are not generally such that they can avoid suffering unless they are secured."

It must not be understood from this language that the provision of the Constitution depends at all upon the smallness of the claim for labor, or the poverty of the claimant. The reasoning was made use of to demonstrate that the constitutional provision was not intended to cover the case of a contractor with a railroad company for doing and completing a job such as that shown by the testimony then before the Court.

It was again held in *Chicago & Northeastern R. R. Co. v. Sturgis*, 44 Mich. 538, that, under an act for the protection of laborers and persons furnishing material for the construction and repairing of railroads in this State, a distinction is clearly marked between those who contract for labor and materials and the persons who actually perform the labor and actually furnish materials. The law limits its protection to the one who labors, and does not extend it to the one who merely hires out the labor of others. The case throws no light upon the present controversy.

In *Jones v. Avery*, 50 Mich. 326, we held that a claim for services performed by a traveling salesman hired at a salary of $1,000 per year was not a labor debt, within the meaning of the Constitution, and hence a stockholder was not liable for it. In deciding the question, this language was made use of:

"He had no part in carrying on the establishment nor in the manufacture. He was a mere outside agent or representative of the company to bring business to it upon a salary. As regards the present question, his position

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was nearer the position of an officer of the corporation than that of a laborer."

That case is quite dissimilar to the one now under consideration. Here Black had nothing to do with the sale of the machinery. He was sent out after the corporation had made sales to put the machinery in running order, and give it a trial to see if it performed the contract satisfactorily. I cannot see why such work is not as much labor for the corporation, in the most ordinary acceptation of the term, as it would be if the same work had been performed in the shops of the corporation, and the test made there. He performed no duty and filled no position akin to an officer of the corporation. In the language of the answer to the petition, his—

"Business was similar in character to that of any head miller employed in running mills equipped with machinery of said corporation."

The statutes under which the decisions above quoted have been made were those based upon the provisions of the Constitution extending the liability, or upon statutes creating a liability, where no contract relations existed, and where no liability existed before or independent of the statute. In all such cases a strict construction must be placed upon the statutes, because, although remedial, they are in derogation of the common law, and impose liabilities where none existed before. But the statute under consideration creates no new liabilities. It is merely a statute regulating the distribution of insolvent estates. It does not depend upon any constitutional provisions to authorize it. It regards the remuneration of labor performed for an employer as more worthy of payment than mere merchandise debts or other unsecured claims against an insolvent debtor. Its merits are of the same nature as those which prefer debts due to the United States or to the State, and debts due for the

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last sickness and funeral expenses, in insolvent estates of deceased persons, and I think it should have a just and liberal construction. If, however, a strict construction should be placed upon the statute, I still think the claim of petitioner would come within the letter and spirit of the statute as "labor performed for the corporation." It was, in a large measure, manual labor, requiring judgment and experience in its performance, and consequently commanding a higher recompense than unskilled and inexperienced labor. I see no reason why, under the statute, the claim for labor should not be entitled to be placed in the class of preferred claims.

The other Justices concurred.

CHARLES D. DURFEE AND PETER C. BIRD v. DANIEL B. NEWKIRK AND JAY HICKS.

Damages—Error without prejudice.

1. Where the damages are capable of accurate *pecuniary* estimation, exemplary damages can never be allowed; citing *Warren v. Cole*, 15 Mich. 273; *Stilson v. Gibbs*, 53 Id. 280; *Wilson v. Bowen*, 64 Id. 133.
2. It is not the duty of an appellate court to reverse a judgment for non-prejudicial error.

Error to Wayne. (Brevoort, J.) Argued November 19, 1890. Decided December 5, 1890.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

Moore & Moore (*Robert E. Frazer*, of counsel), for appellants, contended:

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1. If the defendants are liable at all, they are only liable for the difference between the market value of the oil as it would have been if as represented, and its actual value; citing *Clark v. Moore*, 3 Mich. 60; *Cuddy v. Major*, 12 Id. 368; *Railroad Co. v. Burrows*, 33 Id. 14; *McGuire v. Galligan*, 57 Id. 41; *Woodworth v. Woodburn*, 20 Ill. 184; *Fleming v. Beck*, 48 Penn. St. 312.
2. Defendants are not liable for alleged loss on other oil plaintiffs had on hand at the time of the sale complained of; citing *Crain v. Petrie*, 6 Hill, 522.
3. Plaintiffs were not entitled to exemplary damages; citing *Warren v. Cole*, 15 Mich. 274.

Edwin F. Conely, for plaintiffs.

MORSE, J. Plaintiffs brought action in trespass on the case in the Wayne circuit court, alleging that the defendants had sold to them 100 pounds of peppermint oil, representing to them falsely that the same was good and genuine peppermint oil, when in fact it was dementholized oil, from which the active principle of good and genuine oil, to wit, menthol, had been eliminated to the knowledge of defendants. The jury returned a verdict for the plaintiffs in the sum of $350, for which they had judgment.

The case, as made by the plaintiffs, was that in 1886 and 1887, they were engaged in buying and selling peppermint oil in Wayne county, Mich.; that the defendant Newkirk hired the defendant Hicks to take about 100 pounds of dementholized oil, then belonging to Newkirk, and in his possession, to the plaintiffs, and sell it to them as good, merchantable oil at the ordinary market price, to wit, $2.10 per pound; that Hicks took the oil to plaintiffs and sold it to them, representing that it was good, genuine, peppermint oil which Hicks had raised upon his farm, and had distilled by one Vincent, of Van Buren township, in Wayne county. Plaintiffs bought the oil, relying upon these representations, paying Hicks therefor $200 in cash, and promising to pay

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the balance, $14.95. This balance, however, was never paid. This oil proved to be dementholized, upon analysis. The plaintiffs claimed that they were not only damaged as far as this particular oil was concerned, but that, having a large stock of other peppermint oil on hand and for sale, when it became publicly known that they had in their possession dementholized oil, their business was greatly damaged, because they were obliged to sell their genuine oil at greatly reduced prices, as buyers would not take the same, or any part of it, without analysis, and were suspicious of all oil in their possession.

The defendants claim error on the trial in the following particulars:

1. The plaintiffs were not entitled to recover.
2. Under the declaration the plaintiffs could not recover unless they established their claim that the oil was dementholized.
3. If defendants were liable at all, they were liable only for the difference between the market value of the oil purchased of defendants as would have been, if as represented, and its actual value as it was.
4. The plaintiffs were not entitled to recover for alleged loss in the sale of other oils which they had on hand.
5. Plaintiffs were not entitled to exemplary damages.

Under the first two propositions, it is argued that there was no competent testimony showing that the oil was dementholized when it was sold to plaintiffs, the evidence being that it was distilled from weedy peppermint; that is, peppermint mixed with fireweed, marestail, and other weeds, so that the oil was "weedy" or a "little off," and defendant Newkirk preferred not to ship it east. To this import was the testimony on the part of the defense. But it was shown on the part of the plaintiffs that some of this oil was submitted to analysis, and Dr. Duffield, who analyzed it, testified that it was dementholized. This question was properly submitted to the

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jury to determine, the court instructing them that if they believed that the defendant Newkirk, through the defendant Hicks, represented to and caused the plaintiffs to believe that the oil was good, genuine, peppermint oil, when in fact it was dementholized, and plaintiffs relied upon such representations in buying the oil, they were entitled to recover; but, if the oil in question was not dementholized, then the verdict must be for the defendants, no matter whether the oil was "weedy" or not; and that the burden of proof was upon the plaintiffs to establish the dementholization of the oil.

In relation to the third and fourth propositions, it is evident that the jury did not give the plaintiffs any damage for the loss suffered upon any oil, except the amount purchased of the defendant Hicks. The oil was bought in October, 1886, and $2.10 paid for it. The verdict of the jury in December, 1889, was for the plaintiffs in the sum of $350. Had the oil been good, merchantable oil, the testimony is undisputed that it might have been sold at from $2.75 to $3 per pound. The oil, as it was, was worthless. The 100 pounds at $3 per pound, with 6 per cent. interest, would amount to more than the verdict. It is true, the plaintiffs claimed that the fact becoming known that they had dementholized oil in their possession prevented the sale in that season of some 2,800 pounds of other good peppermint oil which they had on hand for sale; and that thereby they lost, as their testimony tended to show, from 50 cents to $1 per pound on this 2,800 lbs., making a loss of from $1,400 to $2,800 outside of this particular oil purchased of defendants. On the other hand, there was evidence tending to show that plaintiffs' loss upon the other oil resulted from their keeping it for higher prices, and being compelled to sell it next year at lower rates because of a fall in prices. And although the court instructed the jury that

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they might allow plaintiffs' damages for the loss upon all their oil, if they found such loss was occasioned by the selling of this particular oil by defendants to them, it is plain from the verdict that the jury found with the defendants upon this issue, and did not give any damages for loss upon the oil not purchased from the defendants. We therefore find it unnecessary to inquire into the correctness of the instructions of the circuit judge in this respect.

The court, in his instructions as to damages, among other things, said:

"If you believe from the evidence that Newkirk perpetrated the fraud charged, and that he did it willfully, for the purpose of injuring the plaintiffs as rival or competitive buyers, you may add to the actual damages as above indicated some reasonable sum as exemplary or punitory damages proportionate to the maliciousness of the act."

It has been said by this Court that, where the damages are capable of pecuniary estimation, vindictive damages can never be allowed; that for any wrongful injuries where the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation, it is not permissible to abandon a certain rule, which will do complete justice, for an uncertain one, that can hardly fail to do injustice. *Warren v. Cole,* 15 Mich. 273. And in *Wilson v. Bowen,* 64 Mich. 133, it is said that it is not the province of the jury, after *full* damages have been found for the plaintiff, so that he is fully *compensated* for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff as a *punishment* for the wrong he has done to such plaintiff. See, also, *Stilson v. Gibbs,* 53 Mich 280.

There is a class of cases, such as seduction (see *Watson v. Watson,* 53 Mich. 168), where the damages are not

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capable of accurate measurement by a money standard, and where they must necessarily be left to the proper discretion of the jury. In such cases "increased damages" are permitted for circumstances of aggravation in the wrong-doing, but they are not given by the law, as interpreted by this Court, in punishment of the wrong-doer, but as extra compensation to the person wronged, for the reason that the injury is considered greater because of such circumstances of aggravation, and therefore the compensation ought to be greater. Willful trespasses, assaults and batteries, libels and slanders, false imprisonment, and perhaps other actions, where the injury is in part to the feelings of the plaintiff, to his shame and humiliation, are cases where "increased" damages may be given. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Id. 77; *Elliott v. Van Buren*, 33 Id. 56; *Livingston v. Burroughs*, Id. 511; *Scripps v. Reilly*, 38 Id. 10, 25; *Ross v. Leggett*, 61 Id. 452, 453.

But this is not a case where such damages are admissible. Here the wrong was capable of accurate pecuniary measurement, and the damage to plaintiffs was simply a financial one. The motive of the defendants did not affect the wrong, and their fraud, however premeditated and willful, added nothing to any damages which the plaintiffs were entitled to recover as compensation for the wrong inflicted.

But we are not willing to reverse the judgment for this error of the trial court. As it is very plain to us from the testimony that the plaintiffs received no greater amount than was their actual loss on account of the transaction, the judgment will stand. It is not the duty of an appellate court to reverse a judgment, unless it is satisfied that an error has been committed, and that such error has done injustice, or may have been prejudicial to the appellant. In this case, as before shown, the oil pur-

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chased was worthless. If it had been as represented, it would have been worth, under the testimony, about $300. Interest on this amount for three years and two months added would amount to more than the verdict of the jury. It therefore appears that nothing was added in the way of exemplary damages.

The judgment is therefore affirmed, with costs.

The other Justices concurred.

GEORGE C. PALMER, SUPERINTENDENT OF THE MICHIGAN ASYLUM FOR THE INSANE, v. GEORGE M. BUCK, CIRCUIT JUDGE OF KALAMAZOO COUNTY.

Insane persons—Commitment to asylum—Jurisdiction of probate court—Habeas corpus.

1. An order of commitment to the insane asylum which states that the female committed was a *resident* of the State Industrial Home for Girls, in Lenawee county, does not show upon its face that she was serving a term of imprisonment at that home.
2. The laws of this State make a distinction between insane criminals, and those insane persons who are not criminals; the former being governed by Act No. 190, Laws of 1883, as amended (3 How. Stat. chap. 47*a*), and the latter by Act No. 135, Laws of 1885 (3 How. Stat. chap. 46).
3. An order of commitment, made by the judge of probate of Lenawee county, of a female to the Michigan Asylum for the Insane at Kalamazoo, which recites that it is made upon a hearing on a petition on file which alleges that the female is a resident of the Industrial School for Girls, in said county, and is insane, and prays that she may be admitted to said asylum, there to be supported at the expense of said county, recites sufficient facts to give the probate court jurisdiction on the basis of her being such resident.
4. The fact that the superintendent of the insane asylum is liable

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to be harassed with a suit for false imprisonment for detaining an inmate under a void commitment shows sufficient interest in him to ask for a review of an order discharging such inmate on *habeas corpus* proceedings.

5. The writ of *habeas corpus* penetrates the walls of insane asylums as fully and freely as any other place where persons are illegally restrained of their liberty; and orders and decrees of probate courts possess no immunity different from those of other courts when they proceed without jurisdiction.

6. There *may* be some doubt whether Act No. 190, Laws of 1883, applies to insane criminals confined in the State Industrial Home for Girls; but as girls between 10 and 17 years of age may be sentenced to that institution when convicted of being disorderly persons, or of any offense not punishable by imprisonment for life, there is no reason why the statute should not apply to this class of insane persons as well as to those who are serving sentence in the other penal institutions of the State.

7. The person upon whom a writ of *habeas corpus* is duly served is required by How. Stat. § 8565, to state in his return, plainly and unequivocally, the authority and true cause of the imprisonment or restraint complained of, setting forth the same at large, and, if by virtue of any writ, warrant, or other written authority, to annex a copy thereof to his return, and to produce the original to the court or officer before whom the writ is returnable. But on a review of such proceedings by *certiorari* in the Supreme Court, where it appeared that this statute was not complied with, but that no objection was made, and that the petitioner produced the order of commitment under which she was detained on the hearing, the Court regarded the order as the authority for such detention.

8. Where, during an investigation by a probate judge of an application for the admission of an indigent insane person to the insane asylum, it appears that such person has not acquired a legal settlement in his county, he is not ousted of jurisdiction, nor can he refuse for that reason to make the desired order of admission; and he should order the expense to be paid by his county in the first instance, leaving the question of residence and of the county finally liable for such support to be determined as provided by section 25 of Act No. 135, Laws of 1885.

9. The order for discharge in this case is vacated, without costs, but without an order remanding the person discharged to the insane asylum, under the precedent established by *Hamilton's Case*, 51 Mich. 174.

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Certiorari to review *habeas corpus* proceedings resulting in the discharge of an inmate of the insane asylum. Argued November 20, 1890. Order of discharge vacated December 5, 1890. The facts are stated in the opinion.

Osborn & Mills, for plaintiff in *certiorari*.

Hawes & Luby, for defendant in *certiorari*.

CHAMPLIN, C. J. On September 19, 1889, Mary Vetter was brought to the Michigan Asylum for the Insane at Kalamazoo by Mrs. Margaret Scott, and delivered into the custody of the superintendent, under the authority of an order made by the probate court for Lenawee county, which was in the words and figures following:

"STATE OF MICHIGAN, }
"County of Lenawee. }

"At a session of the probate court for the county of Lenawee, holden at the probate office in the city of Adrian, on the 19th day of September, in the year one thousand eight hundred and eighty-nine.

"Present, R. B. ROBBINS, Judge of Probate.

"*In the Matter of Mary Vetter, an Indigent Insane Person.*

"This day having been assigned for hearing the petition, now on file in this court, of Margaret Scott, superintendent of the State Industrial Home for Girls, alleging that Mary Vetter, a resident of the Industrial Home for Girls, in said county, is insane, and praying that said Mary Vetter may be admitted to the Michigan Asylum for the Insane at Kalamazoo, there to be supported at the expense of the county in which it is shown she is a resident; and having duly notified the said Mary Vetter (there being no known relative of the said Mary Vetter in said county), also D. B. Morgan, prosecuting attorney for said county, and Wm. H. Knight, supervisor of the town of Adrian, in which said Industrial Home for Girls is situate, and in which said insane person at present resides, of the time and place of hearing said petition, and having filed the certificates, taken under

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oath, of Drs. Abram Stephenson and Wm. E. Jewett, two legally qualified physicians, and having taken the testimony of Wm. E. Jewett and Margaret Scott, credible witnesses, and having inquired into her settlement, and having fully investigated the facts in the case, without the verdict of a jury as to the question of insanity and indigence, I, the judge of probate in and for said county, do find that said Mary Vetter is in indigent circumstances, and certify that satisfactory proof has been adduced showing the said Mary Vetter to be insane; that she has not acquired a legal settlement in said county of Lenawee, but is a resident of the county of Kalamazoo; and that her estate is insufficient to support her under the visitation of insanity.

"It is ordered that the said Mary Vetter be admitted to the Michigan Asylum for the Insane, under and according to the provisions of section 23 of Act 135, Laws of 1885, there to be supported at the expense of the county of Kalamazoo until restored to soundness of mind, if effected within two years, and until otherwise ordered.

"RICHARD B. ROBBINS,
"Judge of Probate."

On June 25, 1890, Mr. W. A. Luby, acting as attorney for Mary Vetter, filed with Hon. George M. Buck, circuit judge of Kalamazoo county, a petition for *habeas corpus*, which was granted, and directed to George C. Palmer, the superintendent of the Michigan Asylum for the Insane. On account of the absence of Dr. Palmer from the county, the writ was served upon Thomas R. Savage, the assistant medical superintendent for the asylum, who produced the body of Mary Vetter before the circuit judge, and made return to the writ, setting up, in substance, that Mary Vetter was detained at the asylum by authority of the order of the judge of probate of Lenawee county, and that she had been cared for and treated in the asylum since the date of her admission, and giving a history of her case. No examination was made as to the sanity of Mary Vetter, and no proofs offered to show her mental condition. The court, upon

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examination of the commitment referred to in the return, made the following order:

"*In the Matter of Mary Vetter.*

"It appearing from the return of the writ of *habeas corpus* heretofore issued out of this court for the relief of Mary Vetter, that she, the said Mary Vetter, is detained at the Michigan Asylum for the Insane, and that such detention is without authority of law, it is ordered that said Mary Vetter be, and she is hereby, discharged and released from such unauthorized detention."

The grounds upon which the petitioner claimed a discharge may be reduced to three:

1. That Mary Vetter was not insane.
2. That the probate judge of Lenawee county acted without authority, and had no jurisdiction to make the adjudication and order under which she was detained.
3. That there were irregularities in the proceedings in the probate court which made her detention illegal.

The first and third grounds were not made to appear by any proof before the circuit judge, and the only question upon the merits is whether the order of commitment was fair upon its face, and sufficient to justify the superintendent in receiving and detaining Mary Vetter in the asylum.

There is nothing upon the face of the order of commitment to show that Mary Vetter was serving a term of imprisonment at the State Industrial Home for Girls. It merely states that she was a resident of the home. Had it shown that she was a convict serving sentence at this reformatory of the State, the probate judge would have had no jurisdiction under the provisions of section 23, Act No. 135, Laws of 1885, to make the order that he did. The laws of this State make a distinction between insane criminals, and those insane persons who are not criminals. The former are governed by Act No. 190, Laws of 1883, and the amendments thereto, and the

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latter by Act No. 135, Laws of 1885, and the amendments thereto.

There may be some doubt whether the law of 1883 applies to insane criminals confined in the Industrial Home for Girls; but when it is seen that girls between 10 and 17 years of age may be sentenced to that institution who shall be convicted as disorderly persons, *or of any offense not punishable by imprisonment for life*, there is no reason why the statute should not apply to this class of insane persons as well as to those who are serving sentence in our other penal institutions. If the statute does not apply, then there is no statute which would authorize the inmates of this institution who become insane to be transferred to an insane asylum. The Industrial Home for Girls is a penal reformatory institution. It was at first called a "reformatory," and, although its name has since been changed, its character remains the same, the peculiar distinction being that when the authorities to whom that subject is confided shall be of the opinion that an inmate has reformed they may discharge her from imprisonment, although her sentence has not then expired. The Legislature, in the amendments made to the act in 1889, seem to have regarded the act of 1883 as applicable to the reformatory institutions as well as to the State prisons and houses of correction. See section 29, as amended by Act No. 179, Laws of 1889, where the Legislature has provided for the transfer back to the house of correction, prison, or reformatory from whence he came of any lunatic restored to reason.

In the *habeas corpus* proceedings before the circuit judge, the fact that Mary Vetter was, at the time of the action had by the probate judge, serving a sentence in the Industrial Home for Girls, might have been set up

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by way of replication to the answer. But no such fact was alleged as a replication, although such fact is alleged in the petition for the writ.

The proceedings before the judge on the return of the writ was somewhat irregular. The law requires the person upon whom such writ shall have been duly served to state in his return, plainly and unequivocally, the authority and true cause of such imprisonment or restraint, setting forth the same at large, and, if by virtue of any writ, warrant or other written authority, to annex a copy thereof to his return, and produce the original to the court or officer before whom the writ of *habeas corpus* is returnable. This Dr. Savage did not do. But the petitioner produced the order under which she was detained, and, as no objection was made, we shall regard it as the authority for such detention.

By this order the probate judge purports to have acted under section 23 of Act No. 135, Laws of 1885. He recites that the petition states that Mary Vetter was a resident of the Industrial Home for Girls in said county, that she was insane, and praying that she might be admitted to the Michigan Asylum for the Insane at Kalamazoo, and there supported by the county in which she is shown to be a resident. There are enough facts recited to give the probate court jurisdiction on the basis of her being a resident of Lenawee county. He gave proper notice to the officers whom the law required to be notified in such case. He had jurisdiction over the person and subject-matter, and proceeded with his investigation, in the course of which he became satisfied that instead of being a resident of Lenawee she was a resident of Kalamazoo county. This did not oust him of jurisdiction. Section 25 of the act provides that whenever the probate judge of a county before whom an indigent insane person

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may be brought shall find that such person has not acquired a legal settlement in his county, he shall not for that reason refuse to give the order to admit the insane person into the asylum, but in that case he shall make separate reports, etc. The object of the law is to provide an asylum where the indigent insane may be cared for and treated. This is the main object. The other pertains to the expense, and upon what county it shall be cast. The law requires that the county in which the indigent insane person resided shall pay the expense. The probate court should have ordered the expense to be paid by Lenawee county in the first instance, in accordance with the petition, and then the law provides a method of determining the residence and the county which shall support such person, if settled in any county in the State. But such error does not render his adjudication upon the insanity of Mary Vetter invalid, or make his order void based upon such adjudication.

The order of commitment was fair and regular upon its face, so far as it conferred authority upon the superintendent of the Michigan Asylum for the Insane at Kalamazoo to receive and detain Mary Vetter as an inmate of such asylum, and upon the showing before the circuit judge she should have been remanded.

It is contended that Dr. Palmer has not such an interest in the proceedings as authorizes him to sue out this writ. If, however, the order under which he detained Mary Vetter was void, he would be liable to be harassed with a suit for false imprisonment, and we think this fact shows sufficient interest in him to ask a review of the adjudication by which she was discharged.

The plaintiff claims that the writ should have been served upon him. But this contention is answered by How. Stat. § 8610.

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I quote the following from the brief of plaintiff's counsel:

"It is probably not very important whether Mary Vetter is returned to the asylum under the circumstances or not; but it is highly necessary that a decision should be made by this Court determining specifically the extent of the powers of courts and judicial officers to review upon *habeas corpus* the orders and decrees of probate courts admitting patients to the insane asylums of this State, and their right to discharge patients therefrom upon *habeas corpus.*"

In reply to this it is sufficient to say that the writ of *habeas corpus* penetrates the walls of insane asylums as fully and freely as any other place where persons are illegally restrained of their liberty, and that the orders and decrees of probate courts possess no immunity different from those of other courts when they proceed without jurisdiction.

Under the intimations contained in the petition for *habeas corpus,* and in the brief of counsel for plaintiff, we do not think it would be profitable to recapture or to remand Mary Vetter to the custody of the superintendent of the Michigan asylum; but under the precedent of *Hamilton's Case,* 51 Mich. 174, the order of discharge will be vacated, without costs.

The other Justices concurred.

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MARGARET W. ALLIS, EXECUTRIX, ETC., AND WILLIAM W. ALLIS ET. AL., EXECUTORS, ETC., v. CARL G. A. VOIGT AND WILLIAM G. HERPOLSHEIMER.

83 537
90 128

Pleading—Common counts.

Plaintiffs sought to recover on the common counts in *assumpsit* for an extra fly-wheel furnished by their testator under a contract made by him with the defendants for the sale to them at a specified price of a power outfit, to be by him set up in their flouring-mill in the city of Grand Rapids, without expense to them, except that they were to do all *teaming* required in said city. The original fly-wheel was broken by defendants' employés while hauling it to the mill, and plaintiffs' testator furnished another one in its place, and on the completion of the contract the contract price was paid by the defendants. The bill of particulars contained charges for all of the items of machinery covered by the contract, including the original fly-wheel, and also a charge for the fly-wheel furnished in its place. On the trial plaintiffs' counsel offered to show the foregoing facts, and that the breakage occurred through the negligence of defendants' employés, and that the new wheel was furnished upon the express understanding that the question of who was liable for it should be settled thereafter, and plaintiffs sought to recover for the value of the new wheel, which recovery, it is held, cannot be had under the common counts in *assumpsit*.

Error to Kent. (Burch, J.) Argued November 20, 1890. Decided December 5, 1890.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Norris & Norris, for appellants.

Uhl & Crane, for defendants.

LONG, J. There does not seem to be any contention

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between the parties over the facts in this case. They are substantially as follows:

This action was brought by the late Edward P. Allis against Carl G. A. Voigt and William G. Herpolsheimer to recover an alleged balance due to him from them upon the construction of a power outfit, which comprised an engine, boiler, fly-wheel, and other machinery set up in the Crescent Mills in Grand Rapids. The contract of sale is contained in the original contract made between the defendants and Mr. Allis, and the correspondence between the parties subsequent to this contract. The original contract was executed on the part of Mr. Allis by his agent August 15, 1887. Mr. Allis declined to accept this contract, unless some of the conditions could be modified, and September 2, 1887, proposed certain modifications to the original contract. The defendants, on September 12, 1887, gave a qualified acceptance of the modifications proposed by Mr. Allis. Mr. Allis, on September 14, 1887, assented to the qualified acceptance of the modifications of the original contract. The contract price of the power outfit was $6,829.54, which the defendants agreed to pay in the following manner:

"One-third cash upon shipment, one-third cash when the plant is ready to start, and one-third cash in thirty days from the time test has been made, and guaranty demonstrated to be filled."

But, if no expert test should be called for, then the last payment should be made in 30 days from the time Mr. Allis should turn the plant over to the defendants in good running order. The contract between the parties contained the following provisions in regard to the delivery of the power outfit:

"The above machinery to be erected in the Crescent Mills, Grand Rapids, Michigan, without expense to you, except that you shall do all teaming required in Grand Rapids, and furnish all mason and carpenter work."

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"We agree to furnish you drawings for the location of the above machinery within ten days after receipt of order, and to have the outfit in running order not later than December 15, 1887."

"We will use our best efforts to get the outfit in place as promptly as possible, but we will not agree to any forfeiture for delay beyond December 15, 1887."

"It is to be understood that the man who erects the plant is to remain in charge long enough after the plant is started to determine that everything is in good working order."

Mr. Allis shipped the power outfit to Grand Rapids, and sent his agent, Mr. McDonald, there to erect it in defendants' mill. The defendants engaged Mr. Davis of Grand Rapids to do all the teaming required there. McDonald went to the depot in Grand Rapids, and pointed out to Davis the machinery which he desired to have hauled first. Mr. Davis loaded certain machinery of this power outfit, including the "fly-wheel," upon a sleigh, and hauled it to a point near the defendants' mill. While Mr. Davis and his employés were unloading the machinery, the fly-wheel was broken. Mr. Allis, after the breakage, furnished a new fly-wheel, of the value of $430, and erected it in the mill as part of the power outfit contracted for. The defendants thereupon paid to Mr. Allis the contract price of $6,829.54. Mr. Allis afterwards claimed that the defendants were liable to pay for the broken wheel, and the defendants deny all liability therefor. Therefore Mr. Allis brought suit to recover the original value of one fly-wheel, $430, and also the sum of $26.01, which the defendants had paid for freight upon the fly-wheel and charged to him.

The declaration contained only the common counts in *assumpsit*, and the bill of particulars specified "balance due, with interest from March 16, 1888, $415.86." The plaintiffs recovered in the court below for all the items except the fly-wheel, and the freight paid by defendants

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and charged to Mr. Allis, and therefore these two items are the only ones in controversy in this case.

The plaintiffs' cause of action as stated in their offer to prove is as follows:

"That after the arrival of the fly-wheel in Grand Rapids, and while same was in charge and custody of defendants' servants, employés employed by the defendants to haul the same from the depot to the Crescent Mills, the said employés so negligently and unskillfully handled said fly-wheel that the same was broken and rendered useless; that the plaintiffs' testator thereupon furnished and erected a new fly-wheel, of the value of $430, upon the express understanding that the question of who was liable for it should be settled thereafter, and that it is for the value of that new fly-wheel furnished the plaintiffs seek to recover."

The defendants upon the trial of the case in the court below, in substance and effect, contended: That Mr. Allis had contracted to errect for the defendants in their mills a complete power outfit, for which, when erected, tested, and in good running order, they were to pay the contract price; that, as the plaintiffs' testator had brought this action upon the common counts for goods sold and delivered, they could only recover upon showing a full performance of the contract, namely, that they had erected a complete power outfit in the defendants' mills, in compliance with their contract, and that the same was in good running order; that the plaintiffs could not show under the declaration a breach of the contract by the defendants in respect to the provision in regard to teaming in Grand Rapids.[1]

The circuit judge ruled with the defendants, and excluded the evidence offered by the plaintiffs to show that the defendants' employés so negligently and unskillfully handled the fly-wheel that the same was broken.

[1] Counsel cited *Machine Co. v. Gaertner*, 63 Mich. 520; *Cole v. Common Council*, 53 Id. 438; *Butterfield v. Seligman*, 17 Id. 95.

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The argument of counsel for plaintiffs here is that plaintiffs' testator was to do certain work and furnish certain goods; that defendants were to pay for the same, and do certain work; that, in doing the work which the defendants under the contract were to do, they so did it that plaintiffs' testator was compelled to do certain additional and extra work, and furnish extra and additional material; that he fully performed on his part and furnished the extra work and material which defendants' action obliged him to provide in order to do as he had agreed; that after all this was done nothing remained but for defendants to pay, and that for such extra work and material so furnished he could sue and recover on the common counts in *assumpsit*, as the question of breakage comes in only as determining the question of who created the necessity for the extra work and material.[1]

At first blush there would seem to be much plausibility in this argument. But the suit is brought upon the contract under the common counts in *assumpsit*. The first item of the bill of particulars of plaintiffs' claim is for "one 14x42 Reynolds-Corliss engine complete, with fly-wheel, 12x23." This item also contains charges for all the fixtures and material for the erection of the mill. This is under the date of December 27, 1887. These items make up the total of the original contract price of $6,829.54. Under date of February 11, 1888, the bill of items shows a charge for one split fly-wheel, 12x23, $430, and for freight charges. The original contract was for one fly-wheel to be used with the engine, etc., and the last payment to be made within 30 days from the time Mr. Allis turned the plant over to the defendants in good running order. It is seen, therefore, that the original contract only called for one fly-wheel, and that

[1] Counsel cited *Bush v. Brooks*, 70 Mich. 466.

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to be erected in the mill, and in good running order, when the final payments were to be made. The defendants paid the full contract price. This action is now brought on the common counts in *assumpsit* to recover the value of the extra fly-wheel.

It is evident, under the contract, and the circumstances here stated, that the plaintiffs could only recover for this extra fly-wheel upon the ground that the defendants were guilty of some negligence in transporting the wheel from the depot to the mill; that it was the duty of the defendants, under the contract, safely to take the wheel from the depot and place it in the mill; that in doing so Davis, the truckman, and his men, were the agents and servants of the defendants, and for whose negligent acts the defendants could be held responsible to the plaintiffs; and that, in doing this work, Davis and his employés were so negligent and careless that the wheel was broken without the fault or negligence of Mr. Allis or his servants and agents. The questions sought to be litigated involved these elements on any view of the case which may be presented. The argument of the learned counsel does not meet the whole question. It is not simply a question whether an extra fly-wheel was furnished, and whose duty it was to furnish it, but it involved all the other issues stated.

We are not called upon under the state of the pleadings here to determine what the contract means, or who was to transport the wheel from the depot to the mill, or who would be responsible for the breakage. Under the common counts in *assumpsit*, these questions cannot be litigated. The defendants when they come into court to answer to such charges have the right to be advised by the pleadings what the claim is, and in what manner they are chargeable with negligence. The correct solution of the questions involved might depend upon extraneous circumstances brought to aid the interpretation of the

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contract. When such a case is presented, it will then be time to give construction to the contract. As the case is now presented, the court very properly ruled that recovery for the wheel could not be had under the common counts in *assumpsit*.

The judgment must be affirmed, with costs.

The other Justices concurred.

DAVID WOLF, ASSIGNEE, ETC., v. ARTHUR B. SLOSSON.

83 543
89 350

Assignment for benefit of creditors—Preferences.

An assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor, by proof of an unlawful preference, or of "any fraud in the matter of such assignment." *Coots v. Radford*, 47 Mich. 37.

Error to Osceola. (Judkins, J.) Argued November 20, 1890. Decided December 5, 1890.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Charles B. Lothrop, for appellant.

Charles H. Rose, for plaintiff.

[The points of counsel are fully stated in the opinion. —REPORTER.]

CAHILL, J. Stevens & Farrar, a firm doing a general hardware business at Evart, Mich., made a general assignment for the benefit of their creditors on February 8,

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1890, to the plaintiff, who, with his brother, were bankers at Evart, under the name of Wolf Bros. No question is made of the regularity and strict compliance with the provisions of the statute of all the assignment proceedings on their face, including the filing of the bond, notice to the creditors, etc.

On February 1, 1890, Stevens & Farrar, claiming to be indebted to Wolf Bros. in the sum of $500, gave them a chattel mortgage on their stock, due April 1, 1890, for that amount.

Fletcher, Jenks & Co. are a firm doing a wholesale hardware business at Detroit, and, at the time of the assignment of Stevens & Farrar, were their creditors to a large amount. On February 28, 1890, Fletcher, Jenks & Co. began a suit in the circuit court of Osceola county, by attachment, against Stevens & Farrar, and the appellant, the sheriff of said county, took, by said writ, the goods in controversy from the assignee. This suit in trover was then brought by the assignee against the sheriff.

On the trial the plaintiff offered in evidence, and relied upon, the assignment and the proceedings subsequent thereto to support his title. Evidence was also offered of the seizure of these goods, while in the hands of the assignee, by the defendant under his writ of attachment against Stevens & Farrar. The defendant offered in evidence the chattel mortgage, dated February 1, 1890, from Stevens & Farrar to Wolf Bros., claiming that it was really a part of the assignment, was simultaneous with it, and was taken with full knowledge on the part of the assignee of the insolvency of the assignors, and of their intent to make an assignment, and constituted such a preference as to render the assignment void as against the attachment levy. The trial judge excluded the mortgage, holding that, even were the facts as claimed, this

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preference did not avoid the assignment, and constituted no defense to the action, and that a creditor's only remedy in case of such preference was by proceedings in equity under the statute.

The question here raised is as to whether an assignment, under chapter 303, section 1, How. Stat., which provides "that all assignments commonly called common-law assignments for the benefit of creditors shall be void, unless the same shall be without preferences as between such creditors," can be attacked in a court of law by proof of unlawful preferences. It is conceded by counsel for appellant that the rule was considered as settled in this State against him by *Coots v. Radford*, 47 Mich. 37, except for the case of *Kendall v. Bishop*, 76 Mich. 634. But it is claimed that the latter case has shaken the view formerly entertained by the profession, and that many now regard the doctrine of *Coots v. Radford* as essentially modified, if not entirely overruled. We are all agreed that it was not the intention of the Court, in the case of *Kendall v. Bishop*, to overrule *Coots v. Radford*. The instrument considered in *Kendall v. Bishop* was not intended by the parties to it as an assignment under the statute. It was held to be an assignment by construction merely. No attempt had been made by the parties to comply with the statutory requirements concerning assignments by giving a bond, or in any other respect, and, although the decision was not put upon the ground that an attachment would lie against the property because the statutory requirements concerning assignments had not been complied with, still that fact was in the case, and must have had its weight in determining the result.

It was said in *Beard v. Clippert*, 63 Mich., on page 719, that—

"A creditor of the assignors, after the time given by

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the statute to file the bond has expired, has two remedies open to him. He may proceed upon the equity side of the court to have the trust carried out through the intervention of a receiver and the supervisory powers of a court of chancery, or he may, if no other creditor invokes the aid of chancery, proceed to enforce his claim against the property of his debtor by levy of attachment or execution, as if the attempted assignment had not been made. He is not obliged, because an attempted assignment has been made, *but fails utterly for want of the filing of the required bond*, to proceed to enforce the trusts of the assignment in a court of equity."

It is said that the language here used was *obiter*, but nevertheless it states the doctrine which was applied in the case of *Kendall v. Bishop, supra.*

It must be declared as the settled law of this State that an assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor, by proof of unlawful preferences, or of "any fraud in the matter of such assignment." Relief against such a fraud is ample, under sections 6 and 11 of the act, but when given it will be for the benefit of all concerned as creditors. To declare an assignment void on the ground that it gives a preference to A., so that B. may obtain a like preference by attachment, is not what the statute contemplated, if all its provisions be read together. This is not saying that such a construction of the statute is without difficulty. The apparent inconsistencies of the various provisions have been considered in former cases, and the effort has been in each case so to harmonize them as to secure, if possible, the beneficial results intended to be accomplished, viz., an equal distribution of an insolvent estate among creditors. *Fuller v. Hasbrouck*, 46 Mich. 78; *Munson v. Ellis*, 58 Id. 331.

The judgment must be affirmed, with costs.

The other Justices concurred.

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ADRIAN LAMPER v. JOHN H. ROBERTS. 83 547
119 500

Arrest—Civil warrant—Sufficiency of affidavit.

An affidavit for a civil warrant which sets forth that the defendant represented to the plaintiff that he was superintendent for a railroad contractor, and authorized to hire men and teams, and that he would pay $3.50 per day for the services of plaintiff and his team, and furnish transportation to the place where the work was to be done, where he would be furnished accommodations at $1 per day, and that in reliance upon such representations, which were averred to be false, plaintiff agreed to go to work at the price stated, and on arriving at the place designated was informed by a person claiming to be the contractor that defendant had no authority to hire men or teams, and that plaintiff would only be paid $2.25 per day, for which sum he worked for a time and then returned to his home, while not as clearly framed as is desirable, is sufficient to give the court jurisdiction.

Error to Kalamazoo. (Buck, J.) Argued November 20, 1890. Decided December 5, 1890.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Osborn & Mills, for appellant, contended:

1. The warrant was authorized, if at all, under How. Stat. § 6832, subd. 8, but could not issue until such an affidavit as is required by section 6834 had been filed, which was not done; citing *In re Teachout*, 15 Mich. 346; *Proctor v. Prout*, 17 Id. 473; *People v. McAllister*, 19 Id. 217; *Brown v. Kelley*, 20 Id. 27; *In re Stephenson*, 32 Id. 60; *Hackett v. Circuit Judge*, 36 Id. 384; *Badger v. Reade*, 39 Id. 774; *DeLong v. Briggs*, 47 Id. 624; *Meddaugh v. Williams*, 48 Id. 172; *Sheridan v. Briggs*, 53 Id. 569.

L. N. Burke, for plaintiff.

GRANT, J. This suit originated in justice's court, where the plaintiff recovered judgment for $22. Defend-

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ant took a special appeal to the circuit court, where the judgment was affirmed, and defendant appeals to this Court. The only question involved is the sufficiency of the affidavit upon which a civil warrant was issued for the arrest of the defendant.

The affidavit set forth that Roberts represented himself as the superintendent of one Fitzgerald, who was constructing a railroad in the county of Lake, and that he was authorized to hire men and teams for Fitzgerald; that he would pay $3.50 per day for the services of plaintiff and his team; that good and suitable shelter and accommodations for plaintiff and team at $1 per day would be furnished; that he would furnish transportation for plaintiff and team from Kalamazoo to Baldwin, in Lake county; that, relying on the truth of these representations, plaintiff agreed to go and work for the price and upon the conditions above stated; that, upon arriving at Baldwin, he was informed by the party claiming to be Fitzgerald that Roberts was not authorized to hire men or teams; that his contract could not be recognized, and that he would be paid only $2.25 per day; and that plaintiff worked a while and then returned. Other circumstances of an aggravating character are stated in the affidavit, but it is unnecessary to give them here. It is alleged that the representations made by Roberts were false and fraudulent.

While the affidavit is not as well or as clearly framed as is desirable, yet we think it sufficient to give the court jurisdiction. If the allegations were true, a gross fraud has been perpetrated upon the plaintiff, and, according to the affidavit, the defendant was the party responsible for it.

Judgment affirmed, with costs.

The other Justices concurred.

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JUDSON M. PEASLEE v. ISAAC COLLIER AND ANNA A. COLLIER.

Fraudulent conveyances—Husband and wife—Deed of homestead—Consideration—Release of dower.

This case involves the alleged fraudulent conveyance of a mortgaged homestead, and other land, by a husband to his wife, in consideration of the release of her dower in other real estate owned by him, and which he desired to dispose of, and of $200 claimed to be due her for improvements made upon the homestead; and it is held by a majority of the Court that the proofs fail to establish the fraud charged.

Appeal from Kent. (Grove, J.) Argued November 21, 1890. Decided December 5, 1890.

Bill in aid of execution. Complainant appeals. Affirmed. The facts are stated in the opinion.

Sweet & Perkins, for complainant.

Fletcher & Wanty, for defendants.

CAHILL, J This is a bill filed in aid of execution. Complainant recovered two judgments against defendant Isaac Collier, which, with the taxed costs, amount to $515.01. Executions issued upon these judgments, and were levied upon lot 14 of Colton's subdivision of block number eight of Holbrook's addition to the city of Grand Rapids. The premises are claimed by the defendants as their homestead, and are subject to a mortgage of $1,250, but complainant alleges in his bill that the premises are worth more than $3,000. On April 8, 1889, defendant Isaac Collier conveyed the premises in question to his wife, Anna A. Collier, and complainant seeks to have this deed set aside as fraudulent.

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Defendants answered admitting that the premises were a homestead; state that they were mortgaged for $1,250 and interest; claim that they were not worth more than the homestead exemption and mortgage; deny all fraud; and allege a full consideration for the deed from Isaac to Anna A. Collier.

The facts gleaned from the record show that the judgments recovered by complainant against defendant Isaac Collier were for groceries furnished to his family. Defendant Isaac Collier had spent most of his time for a year and more in Battle Creek, where he was engaged in the insurance business, but his family occupied the homestead in Grand Rapids. He was possessed of some real estate in Battle Creek, which, during the fall of 1888, he had contracted to exchange for some patent door-bell stock, but his wife was unwilling to sign the deed unless he would deed her the homestead in Grand Rapids. This, it appears, he was willing to do, but no steps were taken to carry out this arrangement until after complainant commenced his suits in justice's court. Complainant recovered judgments before the justice on Monday, April 8, 1889. On Saturday, April 6, defendant Isaac Collier executed to his wife the deed of the homestead, including also certain lands in Iosco county. At the same time, Anna A. Collier, the wife, joined with her husband in deeds of the Battle Creek property, whereby she released her right of dower. These deeds, although drawn up on Saturday, were not executed and delivered until Monday morning, April 8. It is this deed of the homestead so made by Isaac to Anna A. Collier that complainant seeks to have set aside in this suit. He claims that it was made without consideration, and for the purpose of preventing him from collecting his judgments. On the other hand, the defendants claim that such deed was executed in pursuance of the agreement made between

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the parties to it some months prior thereto; that the release by Mrs. Collier of her right of dower in the Battle Creek property was a valid and adequate consideration for the interest which she secured by the conveyance from her husband to herself, so far as the homestead is concerned.

The burden of proof is upon the complainant to establish the fraudulent character of this deed. The only evidence in the record tending to show such fraud is the fact that such deed was made during the pendency of complainant's suits, and when he was about to procure judgments, and the testimony of Mr. Palmer, the conveyancer who drafted the papers between the Colliers. Being called as a witness for defendants, on cross-examination, he testified as follows:

"*Q.* During the time that you were receiving instructions for and drawing these papers, and while the negotiations were being carried on and completed, was anything said by any of you in regard to Mr. Peaslee's claim?

"*A.* There was.

"*Q.* Who said it, and what was it?

"*A.* Mr. Collier asked me if there would be anything wrong in his deeding the property to Mrs. Collier under the circumstances; that is, while Mr. Peaslee's suit was pending. I told him that he had a perfect right to deed his homestead to Mrs. Collier, and that he had a right to deed any property that he chose to her, for a *bona fide* consideration. That is all I distinctly remember in regard to the conversation; that is the effect of what was said.

"*Q.* It is a fact, is it not, Mr. Palmer, that one of the objects of making that conveyance that Saturday night, and recording it early Monday morning, was the expectation or the fear that if that was not done it would be levied on by Mr. Peaslee?

"*A.* I *think* that Mr. Collier was afraid that the property might be levied upon and sold at a forced sale, and that he did not want to have it sacrificed, and was not in a position to pay the debt in cash; but it was under-

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stood at this time that I should offer Mr. Peaslee security. That is the security that I have referred to.

"*Q.* Was not Mrs. Collier afraid of the same thing that you have mentioned in speaking of her husband?

"*A.* So far as that is concerned, Mrs. Collier told me that she did not know how they were going to meet their obligations, but I told her, as I remember, that I didn't think there was any danger of her losing her home. That is all.

"*Q.* It is a fact, is it not, that at that time Mrs. Collier, as well as her husband, feared that, unless this conveyance was made, the place would be levied upon by Mr. Peaslee, whether or not there might be ultimate danger of losing it?

"*A.* So far as I know as to what she thought, she didn't expect the place would be sold. Mrs. Collier sent for me, and seemed to be troubled about the suit. She seemed to understand that the homestead was exempt to the amount of $1,500, but didn't know whether the mortgage would protect the balance of the value of the property, and I told her that I didn't think there was any danger from Mr. Peaslee's claim, and she seemed to be satisfied so far as that was concerned, but wanted me to go ahead and get the conveyance from Mr. Collier, because Mr. Collier had lost nearly all of his property, some $10,000 or $12,000, which he brought to Michigan some few years ago, and she wanted to save as much as she could for herself and child."

Much of this testimony was objectionable as giving the deductions of the witness. What he thought Mr. Collier was afraid of was not important. On the other hand, Mr. Palmer testified that, at the time these papers were executed between the Colliers, it was understood that the land in Iosco county was worth about $500, and that Mrs. Collier was to secure the complainant's claim on that land if he would accept such security; that pursuant to such understanding, and being instructed so to do by both Mr. and Mrs. Collier, he called on complainant, and offered him a mortgage on the Iosco county property to secure his claim; that complainant said he would look up the title and consider it, and would let

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him know, but for some reason did not do so, but filed this bill.

The witness Palmer also testified that, at the time the papers were executed between the Colliers, the question of consideration for the deed from Mr. Collier to his wife was discussed; that he made some computations as to the value of Mrs. Collier's dower interest in the Battle Creek property; that the value of such property was estimated at $3,500, and Mrs. Collier's dower at one-third of that amount, $1,167. The evidence shows that Mrs. Collier had made certain improvements upon the homestead out of her own money, amounting to $200. The homestead was valued at $2,500, from which was deducted the mortgage, which was called $1,200. This left in the homestead net $1,300, in which Mrs. Collier claimed she had a dower interest amounting to one-third, or $433, deducting which, her husband's interest in the homestead was called $867. To this was added the land in Iosco county, estimated at $500. These two items added together made $1,367, which was the same amount as Mrs. Collier's dower interest in the Battle Creek property, plus the $200 in improvements put by her on the homestead. These figures are somewhat far-fetched, but they serve to show that there was some financial basis for Mrs. Collier's claim that she had given a consideration for the conveyance of the homestead by her husband to her. The desire of Mr. Collier to exchange his Battle Creek property for the patent door-bell stock, however unprofitable it may have turned out to be as a business venture, was yet lawful, and it it had turned out well, and had made him rich, would have been highly commended. He could not make this exchange unless his wife would consent to sign the deed. She refused to sign except on condition that he should deed her the homestead. The homestead would be just as valuable to

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him as a home with the title in his wife as in himself. These considerations were ample to explain the conveyance to his wife without resorting to fraud as the inspiring motive.

That the release of dower in the Battle Creek property was a good consideration for the deed from Mr. Collier to his wife as between themselves is not questioned, but it is claimed that it is an inadequate consideration, and does not serve to relieve the transaction from the taint of fraud which complainant sees in it. In determining as to whether the consideration was adequate, we must take into account the additional fact that Mrs. Collier already had under the law a substantial interest in the homestead; an interest which secured to her the use of it so long as she lived free from any power of her husband or claim of his creditors. Her interest amounted practically to an estate for the life of her husband in the whole, and an estate for her own life in one-third if she survived him. What that interest was worth in dollars and cents it is difficult to estimate. Mrs. Collier had a right to estimate it according to her own judgment, and I am not prepared to say that any miscalculation as to the value of her dower interest in the Battle Creek property, or her interest in the homestead, is any evidence of a fraudulent purpose or intent on her part.

The evidence shows that Mr. Collier offered to turn out to complainant the door-bell stock that he had received in exchange for the Battle Creek real estate, but that complainant refused to accept it on the ground that it was of little or no value. It would seem, therefore, that the Colliers have offered complainant all the property they appear to have of any kind, except the homestead, which now stands in the name of Mrs. Collier. I see in this nothing to indicate any intention to defraud, but rather a desire to pay complainant his debt. The rule

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that fraud is not to be presumed but must be proved applies, and it seems to me the complainant has failed to make by his proofs such a case as entitles him to the decree prayed for.

The decree below is affirmed, with costs of both courts.

LONG and GRANT, JJ., concurred with CAHILL, J.

MORSE, J. In this case I am satisfied from the conduct of defendants, and the testimony of Mr. Palmer, the conveyancer, that the deed from the husband to the wife of the homestead was executed in fraud of the complainant's rights, and for the express and only purpose of putting it beyond the reach of the levy that was anticipated might be made as soon as the complainant obtained his judgment in justice's court. The decree ought to be for complainant.

CHAMPLIN, C. J., concurred with MORSE, J.

PETER WINTERMUTE v. JOHN TORRENT AND NATHAN PLATT.

Bills and notes—Action by indorsee for collection only—Partnership articles—Limitation of authority of partner.

1. An agent to whom negotiable paper is indorsed for collection may sue thereon in his own name (*Moore v. Hall*, 48 Mich. 143) if his indorser could have maintained the action.
2. Articles of partnership provided that the managing partner should not run the firm in debt without the consent of his copartner, who agreed to loan the firm what money was needed from time to time to keep up the stock, and who was to be its only creditor. The managing partner gave the firm note to himself, as guardian, for money belonging to his wards, which was used in the partnership business, and after the note

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was past due he indorsed it to a third party for the *sole* purpose of having it sued in the indorsee's name, who brought suit accordingly. And it is held that the managing partner had no power to make the note and bind the firm in the face of the partnership articles.

Error to Muskegon. (Dickerman, J.) Argued November 21, 1890. Decided December 5, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Bunker & Carpenter, for appellant, contended:

1. Platt, being a general partner, will be presumed to have had authority to make the note in question, and the burden was on the defendants to show the contrary; citing *Littell v. Fitch*, 11 Mich. 525; *Carrier v. Cameron*, 31 Id. 378; and on this issue the only evidence tendered were the articles of partnership, which should have been construed by the court; citing *Thompson v. Richards*, 14 Mich. 172; *Curtis v. Martz*, Id. 506; *Dudgeon v. Haggart*, 17 Id. 273; *Battershall v. Stephens*, 34 Id. 68; *Stadden v. Hazzard*, Id. 76; *Paine v. Ringold*, 43 Id. 341; *McKenzie v. Sykes*, 47 Id. 294; *Gage v. Meyers*, 59 Id. 301; *Tompkins v. Gardner & Spry Co.*, 69 Id. 62; and the question of Platt's authority to bind the firm by making the note was also for the court; citing *Tobacco Co. v. Jenison*, 48 Mich. 460.

Smith, Nims, Hoyt & Erwin, for defendant Torrent.

Frank H. Bassett, for defendant Platt.

LONG, J. This suit was brought to recover the amount due on the following promissory note:

"$1,000. MUSKEGON, MICH., April 12, 1888.

"Three months after date we promise to pay to the order of Nathan Platt, guardian, one thousand dollars, at the Merchants' National Bank, Muskegon, Michigan, for value received, with interest at the rate of eight per cent. per annum.

"NATHAN PLATT & CO."

The note was indorsed as follows:

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"Pay to the order of Peter Wintermute.

"NATHAN PLATT, Guardian."

The cause was commenced by declaration on the common counts in *assumpsit*. Defendant John Torrent pleaded the general issue, and filed an affidavit denying the execution of the note.

It appears that prior to December 13, 1886, the defendants, Torrent and Platt, were copartners in business, under the firm name of Nathan Platt & Co. On that day, notice was given by them of a dissolution of the partnership, which notice contained the statement that—

"All debts and liabilities of said copartnership have been assumed and are to be paid by said Nathan Platt, and all debts owing to the firm are to be settled with him."

It appears that the debts at this time amounted to some $15,000 and upwards. On December 29, 1886, a new copartnership was formed between the parties, under the same name,—Nathan Platt & Co.,—to which, as shown by the articles of partnership signed on that day, Platt contributed $15,000 in goods, and Torrent $5,000 in money or its equivalent. Platt was to give his personal attention to and take charge of the business, and to receive a salary of $1,500 per annum. The stock to be carried was not to exceed $25,000 without Torrent's consent obtained in writing. Torrent agreed that he would from time to time loan to the firm sufficient moneys for the purpose of purchasing goods as the same might be needed for that purpose, such loans to be evidenced by the firm's promissory notes, payable to the order of Torrent, and bearing interest at 7 per cent. Platt was to have three-fourths and Torrent one-fourth of net profits. The partnership articles contained the following clause:

"It is further expressly agreed that no goods, wares,

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merchandise, or property shall be purchased by or for the firm on credit, but all such purchases shall be made for cash, and paid for according to the usual custom in such cases, taking advantage of advance dating of bills; otherwise, second party is to be the only creditor of the firm."

Defendant Nathan Platt is the guardian of certain minors, being duly appointed thereto by the probate court of Muskegon county. As shown by his testimony given upon the trial, he gave Nathan Platt & Co. a check for $1,000 upon the Merchants' National Bank of Muskegon, signed by himself as guardian of these minors. For this check, he gave the note of Nathan Platt & Co. to himself, as guardian, for $1,000, this being the note in suit. He testifies that the check went into the bank to the credit of the firm of Nathan Platt & Co., and made the journal entry on their books "Merchants' National Bank to N. Platt, guardian, check for our note at three months, interest at eight per cent." This was charged to the bank in that entry, and credited to bills payable, and went into bills payable of the firm. Mr. Platt testifies that the special occasion for making this note and procuring the money was that the firm of Nathan Platt & Co. owed a note to E. S. Jaffray & Co. for about $500; that he sent them a renewal note, which they declined to accept, and returned it, and demanded its immediate payment; and that the necessity of paying the note was the occasion of borrowing this money from himself as guardian, and to meet some other matters that were necessary to be met about that time.

It was insisted by Mr. Platt upon the hearing that he was not to pay the debts of the old firm, but that they were to be paid out of the funds of the new concern, and he so testified. It appears further from his testimony that the money arising from this note was used in the firm business, either in the payment of some of this

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old indebtedness or in the purchase of goods. Mr. Torrent never had any knowledge of the making of the note, until more than a year after it became due. Platt went through the formality when the note became due—three months from its date—of placing the same in the bank where it was made payable, and indorsing it over to the bank for collection against Nathan Platt & Co., signing the order for collection as "Nathan Platt, Guardian." The note was not paid, and some time about a year after it became due he took the note from the bank to the office of his attorney, where it was indorsed to the plaintiff in this case. The plaintiff testified that he had no interest whatever in the matter, and all he knew about it was that the attorney of Mr. Platt called his attention to the matter, and said they wanted to have the note indorsed for convenience over to him, and sued in his name, and he said they might, if Mr. Torrent made no objection; and he was, as he says, assured by them that Mr. Torrent was willing it should be done. Substantially these are the facts as they were made to appear upon the trial in the Muskegon circuit court before the jury.

The plaintiff's counsel requested the court to direct the verdict for the plaintiff, which was refused. The court gave two of the defendants' requests, as follows:

"1. If, at the time this suit was commenced, the plaintiff, Wintermute, did not own the note in question, and had no interest in it, your verdict must be for the defendants.

"2. If, at the time the note in question was signed, the defendant Nathan Platt had no right or authority to sign the firm name of Nathan Platt & Co., or to execute the said firm's note to any person other than to said John Torrent, and Nathan Platt, guardian, knew or had notice of that fact, your verdict must be for the defendants."

The verdict and judgment were for the defendants. Plaintiff brings error.

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As an abstract proposition, the court was in error in giving the first request of defendants' counsel in his charge to the jury. The note was properly indorsed over to the plaintiff, and such indorsement conveyed the legal title to him. Having the legal title, he had the right to sue, and could maintain the action if Platt could have maintained it, though he had no equitable interest in it. Negotiable paper may always be sued by the party having the legal title. *Bachelder v. Brown*, 47 Mich. 366. And even an agent to whom negotiable paper is indorsed for collection may sue thereon in his name. *Moore v. Hall*, 48 Mich. 143. But an indorsee in such case could not maintain an action where the indorser could not have maintained it. Platt could not have brought the action in his own name as guardian, and maintained it, and the plaintiff could not maintain it in his name, for he could not acquire any greater rights, or be put in any better position, than Mr. Platt, as guardian, stood. It is not shown that the partnership affairs had been wound up, or any settlement had between Torrent and Platt. The presumption is, from what appears upon the record, that the partnership still continues, so that we have Mr. Platt, as guardian, the real party in interest, bringing suit, in the name of Wintermute for collection merely, against Nathan Platt & Co., and that in the face of an agreement on the part of Mr. Platt, individually, that he would not run the partnership in debt without the consent of Mr. Torrent, and that Mr. Torrent should be the only creditor of the firm.

Partners between themselves may enter into any lawful stipulations they like, and these are binding upon them. These agreements will not, however, bind third parties who did not know of the agreements. But, in this case, Mr. Platt attempts to bind Mr. Torrent upon

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a contract which it was agreed should not be made, and seeks to enforce it upon the plea that he was guardian of these minors when he loaned the money to the firm, and it having, as he claimed, gone into the business for the benefit of the partnership. The rights and equities of these minor children do not enter into this controversy. When that question shall arise, it will be time to look after their interest. But, upon this record, the question is one purely of the right of Platt to make this note and bind the firm in the face of the partnership articles. It must be held that he had no such power. The fact that the court erred in giving the first of the defendants' requests under the view we have of the other question was error without prejudice.

The judgment must be affirmed, with costs.

The other Justices concurred..

JOSEPH FIX, JR., v. JAMES SISSUNG.

Replevin—Value—Jurisdiction of circuit court.

Plaintiff replevied a flock of geese in the circuit court, appraised at $8.80, and shown on the trial to be worth $9.00. The value was alleged to be $200 in the declaration; and the judgment of the circuit court, dismissing the suit for want of jurisdiction, is affirmed.

Error to Monroe. (Kinne, J.) Argued November 21, 1890. Decided December 5, 1890.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

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Gouv. Morris and *I. G. Humphrey*, for appellant.

George M. Landon, for defendant.

CHAMPLIN, C. J. The defendant found a flock of 20 geese belonging to the plaintiff, who was a neighbor, trespassing upon his field, and shut them up, and sent word to plaintiff that he must pay damages. Plaintiff tendered one dollar for damages, and demanded the geese. Defendant refused to accept one dollar, but wanted $5 for damages and 25 cents for feeding the geese. Thereupon the plaintiff sued out a writ of replevin in the circuit court for the county of Monroe, stating in his affidavit that the geese had been distrained or impounded, and were unlawfully detained. The sheriff executed the writ, and returned that he had replevied from the defendant four old geese and fifteen young ones, and one young goose was not found. The total lot replevied were appraised at $8.80.

Before pleading, the defendant moved to dismiss the writ, and set aside the proceedings, for the reason, among others, that the court had no jurisdiction. Two grounds were asserted as the basis of this motion:

1. That "geese" were not within the statute authorizing the distraining and impounding of "beasts."
2. The appraised value of the property showed that the court had no jurisdiction.

The motion was resisted, and the court denied it, for the reason that it was at that time premature. Upon the second point, he held that the plaintiff was not precluded by the appraisal, but might allege in the declaration, and prove upon the trial, that the value of the property exceeded $100. The plaintiff's counsel would not admit the value of the property to be less than $100, but exhibited a declaration which he proposed to, and after-

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wards did, file, alleging the value at $200. Upon the first point, the court said he thought it clear that geese did not come within the general statutes regulating distress, impounding, and replevin of "beasts;" but, as sections 673 and 2869, How. Stat., provide that villages and townships may make regulations respecting the restraining and impounding of animals, including geese, he would be obliged to await the development of the proofs upon the trial, but if the plaintiff should fail to bring himself within the statute he should feel it his duty to dismiss the case for want of jurisdiction, and permit the plaintiff to proceed at his peril. Upon the trial, no such proof was attempted, and plaintiff offered no proof as to the value of his geese, and strenuously opposed the introduction of evidence by the defendant of their value. Such evidence was admitted by the court, and showed the value of the property replevied to be nine dollars.

It is now claimed that the circuit court had jurisdiction, because the plaintiff alleges the value to be $200. The claim is unjustifiable. The facts show that the value alleged in the declaration was made in bad faith, and was a fraud upon the court. Section 18 of Article 6 of the Constitution confers upon justices of the peace exclusive jurisdiction in civil cases to the amount of $100. While values of property depend in a large measure upon opinion, and this Court, when the value is near the limit, will not declare in all cases a want of jurisdiction, if, in good faith, the declaration alleges the value within the jurisdiction of the circuit court, nevertheless, it will not hold that jurisdiction is obtained when the fraud upon the court is apparent, as it is in this case. The circuit court had no jurisdiction of the subject-matter nor the process.

The court was right in dismissing the case, with costs, and the judgment is affirmed, with costs.

The other Justices concurred.

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LOVINA B. GRAND, ADMINISTRATRIX, ETC., v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Negligence—Injury to brakeman—Split switches—Contributory negligence.

1. In this case it is held that plaintiff's intestate was guilty of contributory negligence in undertaking to uncouple defendant's cars while in motion, and while passing over a "split switch" in use on its road, and which, as he must have known, could not be blocked at the place where his foot was caught.
2. Whether Act No. 174, Laws of 1883, p. 191 (3 How. Stat. § 8397*a*), requiring railroad companies so to adjust, fill, or block the frogs, switches, and guard-rails on their roads as to prevent the feet of employés from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, *query*.
3. The failure of a railroad company to comply with the provisions of said act will render it liable to an employé who is thereby injured, in a case where the law applies, if he is not himself guilty of negligence.

Error to Jackson. (Peck, J.) Argued May 9, 1890. Decided December 24, 1890.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Loud & Price, for appellant.

Gibson & Parkinson, for defendant.

CHAMPLIN, C. J. This is an action on the case for negligently killing a brakeman who was in the employment of the defendant.

The declaration contains three counts. The first count sets forth the employment of Allen J. Shivelle as a brakeman on one of defendant's freight trains; that

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Albion is a station on defendant's road, where trains are made up, and containing a yard for that purpose; that plaintiff, with other employés of defendant, were engaged in making up a train, and attaching cars together, and, in such employment it became and was the duty of Shivelle—

"To fasten and couple a certain car, then standing upon the track occupied and used by the defendant, with and to certain other cars, which were then being moved and pushed by such locomotive engine towards and against the car so to be coupled and attached to them; and the plaintiff avers that, in order to couple such cars together, it became and was necessary for said Shivelle to step over and inside the rails of said track upon which said cars were, and over a certain frog or switch denominated a 'split switch,' and there remain until the said cars were forced so close together that they could be coupled and attached by means of the apparatus for that purpose provided; and that, if said switch or frog had been properly constructed, or had been properly blocked, as it was the duty of said defendant to have done, it would have been entirely practicable and safe for said Shivelle to have stepped over said rails, and remained between said cars and the rails of said railroad track, while engaged in coupling said cars. But the said plaintiff avers that said railroad track and switch were not properly constructed, and said switch was not blocked, nor stopped up, so that the feet of employés and others could not enter, but was improperly constructed for the purpose of coupling said cars, to such an extent as to render it highly dangerous to said Shivelle to couple such cars in the ordinary and usual method hereinbefore stated, of which dangerous and improper construction and defects, and unsafe condition, of said railroad tracks and switch or frog, the said defendant was then and there well knowing, and of which dangerous and unsafe condition the said Shivelle was ignorant.

"And said plaintiff avers that the said Shivelle, not having been informed or knowing of the dangerous and unsafe condition and improper construction of said tracks and switch or frog, or the danger incurred in coupling said cars at that place, did then and there attempt to

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couple and attach together such cars upon such defective and dangerous track, as said cars were being pushed and driven together by means of said locomotive engine. Yet the defendant, well knowing the premises, and that it was its duty to block all such switches and frogs, while it was so the occupier of said railroad, while there was such defective, unsafe, and dangerous track as aforesaid, to wit, on the day and year aforesaid, at Albion, aforesaid, negligently, wrongfully, and unjustly permitted the track and switch to be and continue in such defective, improper, unsafe, and dangerous condition; that by means of the premises, and for want of proper apparatus, and for want of blocking in said switch or frog, the said Shivelle, while then and there engaged in the act of coupling together said cars upon said track, with all due care and diligence, was necessarily and unavoidably caught by his foot in said switch or frog, and between said cars, and was then and there killed."

The second count sets forth that Shivelle was engaged in coupling two cars together, and that defendant neglected so to adjust, fill, or block all frogs, switches, and guard-rails on its road as to prevent the feet of its employés, and other persons, from being caught therein.

The third count, which was permitted to be added upon the trial, avers that it was the duty of defendant so to adjust, fill, or block all frogs, switches, and guard-rails on its road, and in said yard, as to prevent the feet of its employés, or other persons, from being caught therein. And the plaintiff avers that the defendant wholly neglected this duty, and negligently, wrongfully, and unjustly permitted a certain switch, known as "the split switch," in said yard, to be and remain unblocked and unfilled. It then avers that Shivelle, while in the exercise of due care, and in the act of uncoupling cars, was caught by the foot, and killed by the train passing over his body. And the plaintiff averred that the said Shivelle came to his death then and there by means of

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the negligence and carelessness of the defendant in adopting and using, and in permitting to be used, such dangerous switches upon its railroad. The last count is the only one which sets up the injury as having occurred by uncoupling cars.

The testimony for plaintiff showed that Shivelle had been in the employ of defendant for seven years, and, during the last two years, as brakeman. He was 25 years of age, and was killed at about half past 6 o'clock on the evening of November 7, 1887. The train upon which he was braking started from Jackson junction to go west to Michigan City, a distance of 153 miles. When it arrived at Albion, it stopped to do some switching. Cars were to be left, and some taken on, at that place. The brakeman doing the switching has command of the train for the time being. The engineer is under his control, and he conducts its movements through appropriate signs from the brakeman. At the time of the accident, Shivelle was the brakeman doing the work, and he had control of the train, which was cut in two, leaving the way car upon the main track. He had thrown one car upon the side track, and there was another to be left, which was between two cars in that portion of the train attached to the engine, and which had passed the switch to the west, and lay on the main track. Shivelle threw the switch so as to permit the train to back east on the main track. The switch lever was on the south side. By throwing the switch for the main track, the south arm of the switch was brought in close contact with the main rail on that side, and the north arm was brought away from the north main rail, about four or five inches at the extreme end, leaving the switch open upon that side. The ballasting came flush

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with the top of the ties, presenting a smooth level surface between the rails.

The switches used upon the main line of the Michigan Central Railroad are what are designated as "split switches," and had been in use by defendant since the year 1883. In the construction of this switch a "frog" is not used. The movable rails of the switch are both between the stationary rails of the road, which, at the point of contact with the switch, are not parallel to each other. The one diverging forms a permanent and immovable rail of the switch track. The ends of the switch rails are planed on the inside, from a point about seven feet back, so as to form an acute angle at the point on the outside of the rail. In the use of this switch, one side is always open, and the other closed; that is, by closing one side the other is opened. Back of the planed portion, when the switch is open, the rail of the switch, and that of the main track, are nearly parallel and about two inches apart for a distance of about seven feet, when they diverge, gradually leaving a wedge-shaped opening between the rails. On the side of the switch which is closed, back of the planed portion, there is a wedge-shape opening between the rails. But neither of these openings occasioned the injury to the brakeman Shivelle. By the use of these switches, the chance for accident is lessened one-half, through carelessness in leaving the switch open, as a train proceeding in the direction that the switch enters the main track will not be derailed. Its use is much safer for the traveling public, and for trains running at a high rate of speed, but is more dangerous for employés, than the frog switch properly blocked, inasmuch as it cannot be blocked without destroying its efficiency, as will be seen by the following cut:

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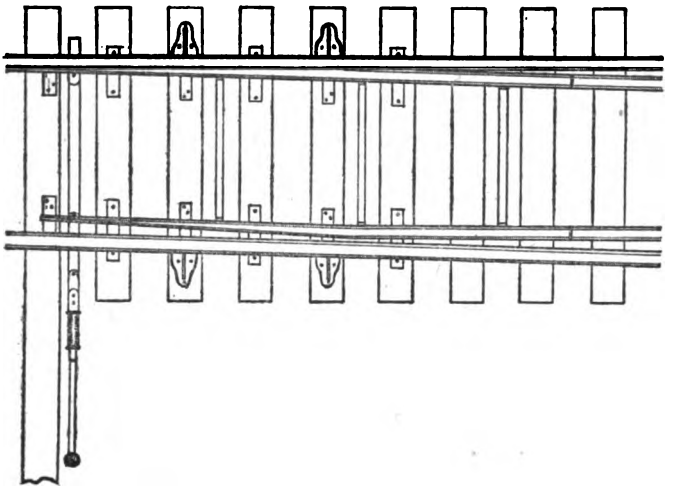

After throwing the switch for the main track, Shivelle crossed to the north side of the main track, and signaled the engineer to back his train. He was not seen afterwards alive. But it is inferred that he stepped between the cars, while in motion, to pull the coupling pin, as the shoe of his right foot was found in the open switch about a foot back from the point, and he lying upon the ground close to the outside of the north rail, with his head to the east, his feet about a foot east of the point of the switch. The wheels of the car had passed over his right leg below the knee, and then along the right side of his body. His left hand rested upon his lantern, the light of which was extinguished. The engineer saw his light go down, and, receiving no further signal, inquired where he was, and he was found as above. Life was extinct.

When Shivelle went into the employment of defendant, he was furnished with the rules of the company, to which all employés were required to give their consent and conform to. Among the rules and requirements were the following:

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"SWITCHES AND FROGS.

"Attention is also called to the necessity of equal care in working about switches at stations, and in yards, to avoid injury by having feet caught in frogs, switches, and guard-rails.

"JUMPING ON AND OFF.

"Jumping on and off cars or engines in motion, entering between cars in motion to couple or uncouple them, and all similar imprudences, are forbidden.

"EXERCISE CAUTION.

"Every employé is required to exercise the utmost caution to avoid injury to himself or fellow-employés, especially in coupling, switching, or other movements of cars and trains."

On September 18, 1885, Shivelle signed a written acknowledgment that he had been informed of the duties connected with his employment, and which he was about to undertake, namely, that of brakeman and switchman, and that the performance of said duties will expose him to great danger, the risk of which he assumed, and that he must use proper and constant care to avoid injury to himself and others. He acknowledged that he had been furnished with a coupling stick, and a copy of the printed rules of the company, with which he was to familiarize himself, and be governed accordingly. He also acknowledged that he had read rule 29, above quoted. Shivelle was well aware of the character of the switches in use upon the tracks of the defendant company, and of the dangerous character to employés of the "split switch," so called. Its danger was open and apparent to all persons occupying the position which he did upon the road. He must have known, for it was apparent, that such a switch could not be blocked at the place where his foot was caught. He entered into the employment of the company, and continued in its service, with full knowledge of the danger to which he was subjected by his employment. He disregarded the positive rules of the

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company adopted for the purpose of protecting him from the danger of uncoupling cars in motion. The danger to life and limb was greatly increased by entering between cars in motion to uncouple them. Besides, in this case, the danger was greatly enhanced to a person who should enter between cars in motion while they were passing over a split switch. No prudent man would undertake to do such a thing. It was not necessary to do so upon this occasion. It was a violation of the rules of the company. Clearly and unmistakably, upon the undisputed facts, he was guilty of contributory negligence in undertaking to uncouple the cars while in motion, and while passing over the switch. *Gardner v. Railroad Co.*, 58 Mich. 584; *Cook v. Johnston*, Id. 437; *Lyon v. Railroad Co.*, 31 Id. 429; *Goulin v. Bridge Co.*, 64 Id. 190; *Brewer v. Railway Co.*, 56 Id. 620; *Illick v. Railroad Co.*, 67 Id. 632.

In this view of the case, the fact that defendant had not complied with the law which requires that all railroad companies shall so adjust, fill, or block the frogs, switches, and guard-rails on their roads in all yards, divisional and terminal stations, and where trains are made up, as to prevent the feet of employés or other persons from being caught therein, would not render the defendant liable in this action.[1] If Shivelle had been free from negligence, this neglect to comply with the law in a case where the law applies would be such negligence on its part as to render it liable. It would stand on the same footing as neglect to ring the bell or blow the whistle, as required by law, and we have uniformly held such negligence would not excuse the party injured from exercising ordinary care and prudence, although the defendant was negligent in not complying with the statutory requirement. *Mynning v. Railroad Co.*, 64 Mich. 93; *Matta v.*

[1] See Act No. 175, § 22, Laws of 1883.

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Railway Co., 69 Id. 109; *Kwiotkowski v. Railway Co.*, 70 Id. 549.

It is claimed that the statute does not apply to the switches used upon this road, for the reason that they cannot be blocked without destroying their use. The question is not one that it is necessary to decide in this case. To hold that no switches can be used, except such as can be blocked, would prevent railroad companies from adopting devices, which, it is proved, add greatly to the safety of the traveling public, although not so safe for employés. As a matter of expediency, looking to the public good and public safety, embracing within its protection the larger portion of the community, is it not reasonable to suppose that the language of the statute was aimed at a class of switches which were susceptible of being blocked without destroying their use? The switches which had long been in common use at the time this act was passed were such as could be blocked without detriment. Such switches are still in use upon the sidetracks of defendant's roads, and were in use at Albion, and the testimony is that they were all properly blocked, as the law requires. But, as before stated, we reserve our opinion as to whether split switches in use on the main track of defendant's road are subject to the law in question, as it is not necessary to decide it in this action.

The court below directed a verdict for defendant, and in this I think he was right, and the judgment should be affirmed.

CAHILL, LONG, and GRANT, JJ., concurred with CHAMPLIN, C. J.

MORSE, J., (*dissenting*). The negligence of the defendant in this case is clearly apparent. It grows out of the positive disobedience of a statute of this State, enacted

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for the express purpose, and in obedience to the popular will, to save the life and limb of brakemen in this State.

It was held in *McGinnis v. Bridge Co.*, 49 Mich. 466, that a brakeman could not recover for an injury received from his foot being caught in a "frog" of the switch then in common use upon railroads in this State, for the reason that he knew of the danger of the same, and that it must be considered one of the ordinary risks of his employment; and that railroads in this State were not in duty bound to block such switches. Under this and previous decisions of this Court, there seemed to be no remedy for the loss of life and limb occasioned by the frogs in switches except by legislation. A bill was passed by the Legislature in the session of 1881, providing for the blocking of switches, which was defeated by the veto or neglect of the then Governor to sign the same. The matter became one of public agitation and concern. Public feeling was aroused, and in the fall of 1882 the subject of blocking and filling switches entered into the political campaign of that year, and was a matter of frequent discussion upon the hustings and in the public press. And the Legislature chosen that year, presumably in accordance with the expressed will of the people, passed another and the following act amendatory to the general railroad law, which was approved by Gov. Begole, and has ever since been the law of this State:

"SEC. 22. All person or persons, railroad companies or corporations, owning or operating roads in this State, shall and are hereby required on or before the first day of January, 1884, to so adjust, fill, or block the frogs, switches, and guard-rails on their roads in all yards, divisional and terminal stations, and where trains are made up, as to prevent the feet of employés or other persons from being caught therein. Any railroad company or corporation which shall fail to comply with the provisions of this section shall be liable to a fine of not less than one hundred dollars, or more than one thousand dollars, and

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the neglect of any such person, company, or corporation to comply with the provisions of this section shall be deemed a violation of the same." Laws of 1883, p. 191.

It is claimed by defendant's counsel that this act was passed before split switches came into general use, and was enacted in reference to switches in general use, which could be blocked or filled; and it is argued that it is not to be supposed that the Legislature intended that the law should apply to improved switches which might be adopted thereafter, and which could not be blocked or filled in compliance with the law, and that, in view of the constant changes that are taking place in the methods and machinery of operating railroads, the courts ought to construe the statute in question with reference to the state of the art at the time it was passed. But it must be remembered in the first place that the "split switch" is by no means a new and improved switch. It has been in use for many years, and is nearly, if not quite, as old as the other switches, but it was not generally used upon the railroads of this State until after the passage of the law of 1883. It is admitted that it is more dangerous to employés than the one against which it is argued the law was directed. It looks to me that the immediate use of this switch, after the enactment of this law, was an attempted evasion of it, which ought not to be countenanced. It is not to be presumed, I think, that the Legislature, in framing this act, intended to pass a law applicable only to the then present circumstances, which law could be evaded before it went into operation by the putting in of switches that could not be blocked or filled, but which were more of a death-trap than those then in general use, which had proven to be a veritable slaughter-pen. The act was not aimed at frogs alone, but in terms, reaches all "frogs, switches, and guard-rails." It is doubtless true that this split switch could not be blocked as

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the ordinary frog is blocked, but there was testimony tending to show that the danger could be greatly reduced, if not removed, by filling in the hollow of the rail, and having a straight surface on the side of both rails, as the foot is caught and retained as follows:

"*Q.* (Referring to model.) What is it about the construction of the split switch here, and the formation of the rails, that makes it retain the foot when it is caught there?

"*A.* Being hollowed underneath, you slip your foot under there. Your ankle is in here, where they are not over two inches apart, and there is no possible way of your pulling your foot out. The further you go the tighter you get. There is only one way to get out,—the way you went in. The T of the rail is what retains the foot. It is wider right in there, so the sole of your shoe would go right in there."

But, whether this switch can be filled or blocked or not, the use of it is, in my opinion, an evasion and violation of the law, which cannot be excused. Much less can such evasion and violation of the statute be used to fasten, as a matter of law, contributory negligence upon every brakeman who is injured by it, on the ground that he, instead of the railroad company, takes the risk of its unlawful use. The plaintiff in this case was not obliged to take the risk that the defendant would knowingly continue to violate the law of the State, or to evade its provisions. *Coots v. Detroit*, 75 Mich. 631, 632. This law was enacted upon the urgent demand that some action should be taken by the Legislature to save life, which was frequently being taken, without remedy, under existing laws. It is not to be supposed for one moment that the Legislature contemplated any circumstances, or change of circumstances, in the use of switches, which would prevent the enforcement of the law, and, at the same time, add danger to danger and death to death. In my opinion, the statute

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is broad enough and strong enough to reach all switches, and cannot be nullified by the use of a switch which cannot be filled or blocked. If a different opinion is to prevail, it would seem that, in the interest of humanity, further legislative action is imperatively needed.

Nor do I think that the plaintiff is debarred from recovery because Shivelle stepped in between the cars, while in motion, to make the switch, in violation of a printed rule of the company. There was evidence tending to show that these cars could not be uncoupled by a man of Shivelle's physical stature, unless they were moving, and it was customary, and habitually done by the employés of the defendant while the cars were in motion. In such case, the defendant company could not hold its employés responsible for a violation of this rule, so as to shield its own gross negligence in the matter of switches. *Hunn v. Railroad Co.*, 78 Mich. 513.

Under all the circumstances of this case, the plaintiff was entitled to go to the jury upon the question of her intestate's negligence.

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JOSIAH MOGG v. WINFIELD S. HALL.

Taxes—Seizure of property—Liability of treasurer—Drains—Law of 1885—Reassessment of tax—Constitutional law.

1. A township treasurer is not liable in trover for property seized under a tax roll and warrant fair upon their face.
2. The drain law of 1885 (Act No. 227), in so far as it provides that drain taxes levied under the drain law of 1881 (Act No. 200) shall be a personal claim against the land-owner until paid, is invalid.
3. A tax roll and warrant under which the treasurer is commanded

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to collect of a land-owner reassessed drain taxes originally levied under the drain law of 1881, which facts appear upon the roll and warrant, are not fair upon their face, the officer being charged with the invalidity of Act No. 227, Laws of 1885, under which he has seized property to satisfy said tax.

Error to Clinton. (Daboll, J.) Argued May 14, 1890. Decided December 24, 1890.

Trover. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Fedewa & Lyon, for appellant.

Spaulding & Walbridge and *Auten & Moss*, for defendant.

[The points of counsel and authorities are stated in the opinion.—REPORTER.]

MORSE, J. Plaintiff sued defendant in trover in justice's court for the conversion of a cow, in January, 1889. Defendant, who is the treasurer of the township of Duplain, Clinton county, seized and sold the cow to satisfy a drain tax of $16.88 upon the tax roll of that township for the year 1888, and reassessed from the year 1884. The case went to the circuit court of Clinton county, where the circuit judge directed a verdict for defendant.

The defendant does not attempt to defend the legality of the tax, but claims that the tax roll was fair upon its face, and, therefore, a complete defense in this action to the officer acting under it. The plaintiff answers that a tax collector is bound to know the law, and, if a statute under which a tax is placed upon his roll is unconstitutional and void, the collector is held to know it, and is liable in trespass or trover for seizure of property to satisfy the tax, notwithstanding the roll and warrant are fair on their face in all other respects; and

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he also insists that the tax roll was not regular upon its face. We think the inquiry here must be restricted to the question whether the warrant was fair upon its face. If it was, the collector cannot be made liable in an action of trover. *Beach v. Botsford,* 1 Doug. 199; *Tweed v. Metcalf,* 4 Mich. 579; *LeRoy v. Railway,* 18 Id. 234; *Bird v. Perkins,* 33 Id. 28; *Wood v. Thomas,* 38 Id. 686; *Byles v. Genung,* 52 Id. 504. The cases cited by plaintiff are in harmony with the doctrine enunciated as above. See *Smith v. Bank,* 17 Mich. 479; *Hagenbuch v. Howard,* 34 Id. 1; *First National Bank v. Watkins,* 21 Id. 483. Two of these are cases where the tax warrants were void on their face, being issued under and referring to a special statute which was unconstitutional. In *Bank v. Watkins, supra,* the warrant of the Auditor General was issued under a special statute, and showed on its face the source and extent of the authority asserted, by referring expressly to the legislative act.

The tax in question appeared on the copy of the assessment roll for 1888, being the official collection roll deposited by the defendant, as township treasurer, with the county treasurer, as required by law, assessed to Josiah Mogg, under column headed "Name of Owner or Occupant." "Description N. ½ of N. W. ¼, Sec. 21. Drain tax, Squire's drain, $16.88." The warrant attached to this roll commanded the treasurer, among other things, to collect—

"The further sum of rejected tax for the year 1884, the sum of $75.38 on Squire's drain; retain in your hands and pay on the order of township drain commissioner."

It also appeared from the roll that $58.50 was reassessed on other lands for drain taxes for said Squire's drain, for rejected taxes of 1884, making with the $16.88 the total

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of $75.38. The plaintiff offered to show that he did not at any time own any of the land so assessed until March 21, 1887, when the N. ½ of the N. W. ¼ of section 21 was deeded to himself and Nellie Mogg, his wife, and that said Squire's drain does not traverse or touch the N. W. ¼ of 21, and that he never had any notice of any proceedings in reference to said drain until the defendant, as township treasurer, demanded payment of the tax. All of this offered testimony was ruled out. Plaintiff's counsel also offered in evidence the certificate of the clerk of the board of supervisors attached to said collector's tax roll, which reads as follows:

"STATE OF MICHIGAN, }
"Clinton county, clerk's office, } ss.

"I hereby certify that the following is a true statement of the State, county, township, fractional district, and other taxes to be raised in the township of Duplain for the year 1888, as determined by the board of supervisors:

"State tax, etc., etc., —— —. Drain tax assessed to Josiah Mogg on the N. W. ¼, sec. 21, $41.88.

"Dated ——— —, 1888.

"CHARLES H. PALMER,
"Clerk of the Board of Supervisors,
"Clinton Co., Michigan."

Plaintiff's counsel also offered in evidence a portion of said assessment roll at the close of the drain special assessment rolls, which follow the descriptions in the general roll, being the following certificate or statement of the supervisor:

"Also I have spread upon the annual assessment roll of said township for the year 1888, by order of the board of supervisors, reassessment on Squire's drain for the year 1884, on the following described lands, to wit:

Name of owner or occupant.	Description.	Sec.	Town.	Range.	Total of Taxes.
Mogg, Josiah...	N. W. ¼	21	8	1 West	$41.88

Defendant's counsel objected to the testimony as irrel-

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evant and immaterial as not an essential part of the roll, and hence as not being any notice to defendant, which objection was sustained and exception taken by plaintiff.

The drain law of 1881, under which the tax of 1884 was assessed and laid, did not contain any provision making the drain tax a personal claim against the owner of the land in so many words; nor did the law contain any provision, as in the law of 1885, that the taxes should be collected in the same manner as State and other general taxes are collected, and no power or authority was vested in the township treasurer to seize and sell personal property of the owner of the land to satisfy such tax as in the case of the collection of general taxes. It provided simply that, if the taxes were not collected, the land should be returned to the county treasurer, and the manner of such return is specified. Section 23, Act No. 269, Laws of 1881, p. 374. The taxes are also made a perpetual lien upon the land until paid. Section 26. Under this law, the property of the then owner of the land could not have been seized and sold to satisfy the tax. If not paid, the only thing the collector could do was to return the lands. The tax was one levied upon the land, and not against the owner. This is further shown by the fact that, in the law of 1885, these taxes were expressly made a personal claim against the owner, and provision made for their collection as against him the same as other taxes are collected. Act No. 227, Laws of 1885, chap. 6, § 6, p. 326 (3 How. Stat. § 1740*f*6). This is an indication that the Legislature construed the act of 1881 as deficient in this respect. It was also provided in the act of 1885 that all drain taxes "properly returned to the county treasurer," and remaining unpaid, "may be ordered charged back by the board of supervisors, and reassessed upon such lands, in the same manner that unpaid or rejected taxes may be charged back by the Auditor Gen-

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eral and reassessed under the general provisions of law." This provision is expressly made to apply to taxes assessed under the act of 1881 as well as under the act of 1885. Id. chap. 6, § 14, p. 328 (3 How. Stat. § 1740*g*4).

The plaintiff contends that the certificate of the clerk of the board of supervisors, and also the certificate of the supervisor, should have been admitted in evidence, and that they were notice to the treasurer, not only that this tax was assessed to plaintiff under section 14 of chapter 6 of the drain act of 1885, as a reassessment of a tax laid in 1884, but also that by the action of the board of supervisors the whole of the N. W. ¼ of section 21 was assessed to the plaintiff, and the taxes laid at $41.88, and that there was no warrant for the township supervisor placing the tax in question upon the roll, to wit, $16.88 upon N. ½ of N. W. ¼ of section 21 to Josiah Mogg. This last claim if good, would end the case in favor of plaintiff, as the defendant would have had notice upon the face of the tax roll that the assessment and levy as made was unwarranted, not being authorized by the board of supervisors. But the defendant's contention is that the certificate of the clerk of the board of supervisors as well as the certificate of the township supervisor do not belong on the tax roll of the treasurer, and form no part of the collector's official roll. *Sibley v. Smith*, 2 Mich. 486; *Tweed v. Metcalf*, 4 Id. 579; *Clark v. Axford*, 5 Id. 182, 187; *Bird v. Perkins*, 33 Id. 28; *Boyce v. Sebring*, 66 Id. 211, 216. But the roll of the treasurer showed without reference to these certificates that the tax assessed against Mogg was a drain tax, and the warrant under which he attempted to make the collection showed further that this drain tax on account of "Squire's Drain" was for the rejected taxes of 1884. The collector, the defendant, must be presumed to take notice of the law. He was therefore informed by his roll and warrant that this

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$16.88, which was the basis of the levy upon the plaintiff's cow, was assessed by the authority of the act of 1885.

When this tax was originally assessed, in 1884, under the law of 1881, as before said, it could not have been made a personal claim against the owner of the land. It was never levied against him, but against the land. The law of 1885 undertakes to make these taxes a personal claim against the owner of the land as follows:

"SEC. 6. All drain taxes assessed under the provisions of this act shall be collected in the same manner as State and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. All taxes levied under the provisions of this act, or of Act No. 269 of the Session Laws of 1881, with all lawful costs, interest, and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands, until they are paid." Laws of 1885, p. 326.

This act could not have the retrospective action contemplated in this section 6. Taxes levied after the act went into effect may properly be made a personal claim, but the rejected taxes of 1884, reassessed under the act of 1885, cannot, in our opinion, be made a personal claim against the owner of the land. Of this invalidity of the law the defendant must be deemed to have had knowledge under the rulings of this Court in *Smith v. Bank*, 17 Mich. 479; *Hagenbuch v. Howard*, 34 Id. 1; *First National Bank v. Watkins*, 21 Id. 483. The tax roll and warrant were not fair on their face, as they carried with their recitals the knowledge to the defendant that he had no right to enforce the collection of this tax by a seizure of personal property.

The judgment of the court below is reversed, and a new trial granted, with costs of this Court to plaintiff.

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It is not necessary to notice the other assignments of error, as the plaintiff upon such new trial will clearly be entitled to judgment as claimed.

The other Justices concurred.

CHARLES E. BELKNAP v. FRANK W. BALL.

Libel and slander—Candidate for public office—Cause of action—Pleading—Demurrer.

1. The declaration in a libel case averred in the first count that the defendant falsely and maliciously published in a public newspaper, in a coarse and blotted imitation of the handwriting of the plaintiff, who was a candidate for Congress, over an imitation of his genuine signature, the following libelous words: "I don't propose to go into debate on the tarriff differrences on wool, quinine, and all the things, because I ain't built that way;" that some of the words were misspelled, as above shown, and all of them were so printed and published as naturally to induce the belief on the part of the reader that the plaintiff actually wrote and subscribed the letter of which said words purported to be a *fac-simile*. In the second count plaintiff averred that at a public meeting in his district he made a speech, and that the defendant published a report of the same, in which report it was falsely and maliciously stated that plaintiff said that he was not there as a candidate begging for votes, and that he would refrain from discussing the tariffs on wool, quinine, etc., because "he wasn't built that way;" the meaning of which latter words was averred to be that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it. And it is held that the declaration made out a case proper to be submitted upon the facts which may be shown by the evidence.

2. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

   a—Criticism is a discussion, or, as applicable in libel cases, a

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censure, of the conduct, character, or utterances of the person criticised.

b—When one becomes a candidate for public office he thereby deliberately places his conduct, character, and utterances before the public for their discussion and consideration, and they may be criticised according to the taste of the writer or speaker, who will be protected in so doing, if in their statements of or reference to the facts upon which their criticisms are based they observe an honest regard for the truth.

c—Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation.

Error to Kent. (Grove, J.) Argued June 11 and 12, 1890. Decided December 24, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson and *Butterfield & Keeney*, for appellant.

Blair, Kingsley & Kleinhans, for defendant.

GRANT, J. This is an action on the case for libel.

Plaintiff was a candidate for election to the office of Representative in Congress. The first count in the declaration, after the usual allegations as to the character of plaintiff and his reputation among his neighbors, alleges that the defendant falsely, wickedly, and maliciously did compose, print, and publish, and cause to be composed, printed, and published in the Daily Democrat, a daily newspaper having a large circulation in the district from which plaintiff was a candidate, and in other parts of the State, and also in the Weekly Democrat, the following libelous words:

"I don't propose to go into debate on the tarriff differrences on wool, quinine, and all the things, because I ain't built that way.

"CHARLES E. BELKNAP."

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That said words were printed and published in a coarse and blotted imitation of the handwriting of the plaintiff, with certain of said words wrongly spelled, and with an imitation of the genuine signature of the plaintiff below the words, thereby meaning that the plaintiff had written said words, and that they were written in the uncouth, blotted, and illy-spelled form represented in the publication, and that said words as printed and published were a *fac-simile* of the words written and signed by the plaintiff.

The second count alleges that at a public meeting held in the city of Grand Rapids plaintiff made a speech. The defamatory matter complained of is that the defendant published in said paper a report of this speech, in which he said:

"Mr. Belknap spoke first. He assured his neighbors that he was not there as a candidate begging for votes; * * * that he would refrain from discussing the tariffs on wool, quinine, etc., because, as he said, he wasn't built that way."

The innuendo is that defendant meant by this language that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it.

The defendant demurred, and as causes of demurrer says:

1. That the declaration does not allege that in said publication there was anything touching or affecting the moral character or integrity of the plaintiff; but that said publications are complained of only in that they are calculated to convey the impression that plaintiff was a stupid, ignorant, and illiterate man, and too ignorant to discuss the tariff question.

2. That no reflection or suspicion is alleged in the declaration to have been caused by the defendant upon the moral character, integrity, probity, and uprightness of the plaintiff.

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3. That defendant was justified in publishing the articles complained of, because the plaintiff was a candidate for public office, and, in the absence of anything touching the moral character, integrity, probity, and uprightness of the plaintiff, the matter stated in the declaration, and the innuendoes therein drawn, do not set forth a cause of action.

The demurrer was sustained by the court below. The demurrer admits the truth of all material facts alleged in the declaration and which are well pleaded. It is proper to consider, first, what these admitted facts are. They are—

1. That the defendant published the statement.
2. That it was false and malicious, and done with the intention of injuring the plaintiff.
3. That defendant published the statement set forth in the first count in such a manner as naturally to induce the belief on the part of the reader that plaintiff actually wrote and subscribed the letter therein contained, and that in the second count the plaintiff actually used the words therein ascribed to him, and that they were published with the malicious intent to injure, and to induce the belief among the people that plaintiff was too ignorant to discuss the question of the tariff.

The gist of the argument on the part of the defendant is that no moral obliquity, unsoundness of mind, impairment of natural faculties, mental or physical, is charged against the plaintiff; that neither his moral, social, nor religious education is attacked, but only his political and academical education; that nothing was published which if entirely true or false and believed would prevent honest members of his own party from voting for him, or constitute a reason or bar to his holding the office, if elected; that the alleged defamatory matter was within the domain of justifiable criticism, and is privileged, and therefore actionable malice will not be inferred, nor can it be predicated in law upon such criticisms or allegations.

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I am not prepared to yield assent to the statement that all honest members of either political party would vote for a confessed ignoramus to represent them in Congress. The statement bears its own refutation on its face, for it is apparent that these publications are made for the express purpose of preventing presumably honest members of the candidate's own political party, as well as others, from voting for him. Counsel omit in their statement one very important element, viz., intelligence. They would hardly be willing to assert that all honest intelligent men would vote for a candidate of their party for an important office who has confessed such ignorance as to show unfitness, although ignorance be no legal disqualification. If defendant's contention be correct, then one may publish of a candidate that he cannot read or write, or that he has confessed that he cannot. No one would seriously contend that such a publication would not be injurious and libelous, and that it would not deprive the candidate of many votes. To hold otherwise would be an insult to the intelligence of our people. Yet no moral turpitude or crime or legal disqualification is charged, and therefore no libel is uttered.

But why stop there if disqualification is to be made the test? Conviction of crime is not by the Constitution of the United States made a disqualification for the office of member of Congress. The only constitutional requirements are that the member shall be 25 years old, 7 years a citizen, and an inhabitant of the state where he is chosen. Aside from these the House of Representatives is the judge of the qualifications of its members. There are many crimes for the conviction of which that body would not consider a member elect disqualified; yet to publish of him, when a candidate, that he is guilty of such crime is admitted to be libelous, if not true. Public journals are in the performance of a high duty when

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they truthfully place such charges before the public. To illustrate, that one has been a gambler does not disqualify him for the office. He may have reformed and become an exemplary citizen. But the fact that he has been a gambler is proper to be placed before the people. The electors are the ones to determine whether they wish such a man to represent them in Congress. Their verdict in his favor would undoubtedly be held conclusive of his right to the office. Disqualification to hold the office cannot, therefore, be made the test to determine the libelous character of the publication.

Criticism is a discussion, or, as applicable in libel cases, a censure, of the conduct or character or utterances of the person criticised. When one becomes a candidate for public office he thereby deliberately places these before the public for their discussion and consideration. They may be criticised according to the taste of the writer or speaker, and the law will protect them in so doing, provided that in their statements of or reference to the facts upon which their criticisms are based they observe an honest regard for the truth. In such a discussion the law gives a wide liberty. Within this limit public journals, speakers upon the hustings, and private individuals may express opinions, and indulge in criticisms upon the character or habits or mental and moral qualifications of official candidates. Cooley, Torts, 217. This is the freedom of the press guaranteed by the Constitution, a freedom necessary for the protection of the liberties and the proper enlightenment of the people. When the facts are truthfully written or spoken of a candidate's character and conduct they then become known to the reader and hearer, as well as to the writer and speaker. Both go before the people together, and they can seldom be misled, and the candidate cannot be injured within the meaning of the law. The same rea-

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soning and rule applies to the utterances of a candidate when they are truthfully stated. But a statement that he gave utterance, either in writing or in speech, to certain language, is neither criticism nor expression of opinion. It is a statement of fact, for the truth of which the publisher is responsible. When language is truthfully stated the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison. Readers can then determine whether the writer has by the publication libeled himself or the candidate. When the language is falsely and maliciously stated privilege ceases to constitute a defense. The case of *Walker v. Tribune Co.*, 29 Fed. Rep. 827, is a good illustration of this principle. Walker had published a pamphlet, and the defendant in its newspaper spoke of it as "plainly the effusion of a crank." It was held that the word "crank" is not in itself actionable, that it has no necessary defamatory meaning, and if it is used in a defamatory sense such sense must be given by an appropriate innuendo. As a criticism, although it underrated the author's talents, it was not libelous. *Bronson v. Bruce*, 59 Mich. 471; *McAllister v. Free Press Co.*, 76 Id. 356; *Bailey v. Publishing Co.*, 40 Id. 257; *Wheaton v. Beecher*, 66 Id. 310.

The character and reputation of the candidate for public office should be protected from malicious attack by the same rule as are those of private individuals. Greater latitude is allowed, undoubtedly, in the one case than in the other. Beyond this the same rule applies to both. The correct and reasonable rule is stated in *Crane v. Waters*, 10 Fed. Rep. 619, as follows:

"The modern doctrine * * * appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man * *

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* with more freedom than they can take with a private matter. * * * In such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury."

In *Wheaton v. Beecher*, 66 Mich. 310, Mr. Justice SHERWOOD, in delivering the opinion of the Court, says:

"There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished."

Justice certainly demands that in these discussions one should not transcend the bounds of truth, for, in addition to the commission of a private wrong, great public injury might result. *Foster v. Scripps*, 39 Mich. 379. In my judgment, a more potent reason exists for the observance of truth in such a case than in publications respecting private matters.

Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. If statements, though false, are published in good faith, and with an honest belief of their truth, the damages may be reduced to a minimum. No other rule will properly protect the freedom of the press and the rights of individuals. In the language of one of the authorities:

"The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to character and qualifications of candidates for office, but

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holding them responsible for the truth of what they publish."

There may be difficulty in distinguishing between justifiable criticism and actionable misrepresentation, but this does not affect the rule. In such cases the jury must determine the question under the proper instructions. None of the cases cited by counsel for defendant, or in the opinion of the learned circuit judge, are at all similar in their facts to those of the case at bar. In none of them did the publication charge the plaintiff with having written or spoken certain language which in fact he did not use. These cases generally go no further than to hold that matters of opinion are not libelous. In my judgment, until courts are prepared to hold that ignorance constitutes no unfitness for office, they must hold the publication set forth in the first count as libelous. If such a letter were written by the plaintiff, it would show him to be ignorant, illiterate, and incapable to perform intelligently his duties as a member of Congress.

The character of the language set forth in the second count depends upon the meaning of the words, "I ain't built that way." The innuendo says that defendant meant that plaintiff was too ignorant and imbecile to discuss the question, or to express in a decent way his intention not to discuss it. The province of the innuendo is to explain and give meaning to ambiguous language. If extrinsic evidence is required to ascertain its meaning the jury must determine that question. *Bourreseau v. Journal Co.*, 63 Mich. 425. The meaning of these words as used in the context is certainly not clear. The demurrer for the purposes of this case admits both the meaning supplied by the innuendo and the malice charged. When all the facts are placed before the court and jury upon the trial, the question whether or not the publication was libelous will be presented for their determination.

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The declaration makes out a case proper to be submitted upon the facts which may be shown by the evidence.

The judgment must be reversed, with costs of both courts, and the case remanded for further proceedings.

The other Justices concurred.

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THOMAS WELLMAN v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Constitutional law—Railroad companies—Authority of Legislature to fix maximum rate of charges—Graded fare law of 1889.

1. It is for the Legislature, and not for the courts, to determine what are *reasonable* maximum rates of charges for the transportation of passengers and freight on the different railroads of the State, under the power conferred by section one of Article 19*a* of the Constitution.
2. Act No. 202, Laws of 1889, which fixes a maximum charge for the transportation of passengers on the different railroads of the State, upon the basis of their gross earnings per mile, and which in so doing distinguishes between railroads located in the Upper Peninsula and those in the Lower Peninsula, is constitutional.

Error to St. Clair. (Canfield, J.) Argued January 24, 1890, and reheard June 13 and 25, 1890. Decided December 24, 1890.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

E. W. Meddaugh and *Otto Kirchner*, for appellant.

W. L. Webber, in behalf of the Flint & Pere Marquette Railroad Company.

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William T. Mitchell, for plaintiff.

John Atkinson, for the people.

[The points of counsel and the authorities are so fully stated and reviewed in the opinions that their restatement from the briefs of counsel is omitted.—REPORTER.]

MORSE, J. By Act No. 202, Laws of 1889, section 3323 of Howell's Statutes, being a part of the general railroad law of this State, was amended. This amendment, for the purposes of this case, is given here in so far as it affects it. It is enacted that every railroad corporation shall possess the general powers, and be subject to the liabilities and restrictions, following, that is to say:

"*Ninth.* To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of $3,000 for each mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains reported as aforesaid were over $2,000 and less than $3,000 per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings, reported as aforesaid, were less than $2,000 per mile of road operated by said company, three cents per mile: *Provided,* That in future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads at the close of any year, shall increase so as to equal or exceed the sum of $2,000 or $3,000 per mile of road operated by said company, then, in such case, said companies shall thereafter, upon the notification of the

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Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger, and his or her ordinary baggage not exceeding in weight 150 pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided: *Provided,* That roads in the Upper Peninsula which report, as above provided, passenger earnings exceeding $3,000 per mile, shall not charge to exceed three cents per mile, and roads reporting less than $3,000 per mile shall be allowed to charge not to exceed four cents per mile."

The gross earnings of the defendant corporation, as shown by the report of said corporation to the Railroad Commissioner for 1888, exceeded the sum of $3,000 per mile. The law took effect October 2, 1889. On that day, the plaintiff applied at the office or station of the defendant at Port Huron for a ticket of passage from Port Huron to Battle Creek, a distance of 159¾ miles. and tendered therefor the sum of $3.20 in legal tender money of the United States. The money was refused, and the agent of the defendant company refused a ticket to plaintiff for such sum, which refusal the plaintiff avers was of damage to him, and brings suit. The suit was commenced in the circuit court for the county of St. Clair, and the plaintiff recovered judgment. The circuit judge charged the jury as follows:

"I charge you, gentlemen, that, by Act No. 202 of the Public Acts of this State of 1889, all railroad corporations, owning or operating railroads in this State, the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year 1888, equaled or exceeded the sum of $3,000 for each mile of road operated by said company, were required to transport passengers at the rate of two cents per mile. It is admitted that the defendant's earnings per mile, as reported to the Commissioner, exceeded that sum. It is claimed by the defendant that this law is unconstitutional and void, but I charge you the law is valid, and that under that law the defendant was bound to transport the plaintiff at the rate of two cents per mile, and for its

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refusal so to do the plaintiff may recover; and it is for you to assess his damages at such sum as you think him entitled to under all the circumstances, and such as will compensate him for the injury he is shown to have sustained."

It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney General, when it was brought into this Court upon writ of error, very properly interposed, and secured counsel to represent the public interest. In the stipulation of facts, or in the taking of testimony in the court below, neither the Attorney General nor any other person interested for, or employed in the behalf of, the people of the State took any part. What difference there might have been in the record, had the people been represented in the court below, however, under our views of the case, is not of material inquiry.

We are not informed what questions were raised in the court below, except that the constitutionality of the statute was attacked. In this Court it is urged that the Legislature has no power to prescribe absolutely a maximum rate for passenger fares; that a railroad corporation is a common carrier, and the Legislature has no right to fix arbitrarily the limit of its charges. It is admitted that the franchise and privilege conferred by the State upon these corporations to build, own, maintain, and operate a railroad, and the power also conferred to exercise the right of eminent domain in securing the right of way for the road, and the right of locating the road-bed and tracks along and across public highways and other thoroughfares, clothe such railroad property with a semi-public character, and subject it to the control of the State, in regard to the compensation for its use, to the extent that its charges must be reasonable, and that the Legislature has the right, as to such

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property, to pass such reasonable rules and regulations as will accomplish that result. But it is insisted that in its ownership it is private property, and the granting of these privileges does not take from the company its right, as owner, to make and fix its own tariff of charges, but only requires, for the protection of the public, that such tariff shall be reasonable. Within the bounds of reasonableness, the owner has full power and right to make such tariff.

Leaving out of view for the present the decisions of the Supreme Court of the United States upon this question, which will be considered hereafter (as this must be conceded to be in some of its phases a federal question, and controlled by such decisions, if applicable), we will examine our own Constitution, policy, and laws as regards this subject. This is the first time, we think, that the right of the State to control and fix the maximum rates of freight or passenger fares has been denied in Michigan. The statute amended by the act under consideration provided that—

"The compensation for transporting any passenger, and his or her ordinary baggage not exceeding in weight *100* pounds, shall not, except on railroads operating less than 20 miles of road, exceed the following prices, viz.: For a distance not exceeding five miles, *four* cents per mile; for all other distances, not exceeding *three* cents per mile; and no fare shall be less than five cents, and that amount, in any case, may be charged and collected: * * * *Provided*, That, in the Upper Peninsula, *five* cents per mile may be charged and collected on all railroads." How. Stat. subd. 9, § 3223, p. 841.

The first general railroad law of the State provided that—

"The compensation for any passenger, and his ordinary baggage, shall not exceed three cents a mile, unless by special act of the Legislature, and shall be subject to alteration as hereinafter provided." Act No. 82, Laws of 1855, subd. 9, § 17, p. 160; 1 Comp. Laws 1857, p. 638.

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In 1869, the Legislature amended this subdivision so that the compensation on roads over 25 miles in length should not exceed three cents per mile; not over 25 miles in length, four cents. Act No. 109, Laws of 1869, p. 182; 1 Comp. Laws 1871, p. 752.

In 1873, after the adoption of the constitutional amendment (article 19*a*) there was a general revision of the railroad laws. In that revision the rate was fixed as found in Howell's Statutes. See Act No. 198, Laws of 1873, p. 506. Section 11 of article 5 of this revision provided that this act might at any time be altered, amended, or repealed, but such alteration, amendment, or repeal should not affect the rights of property of companies organized under it. Laws of 1873, p. 542; How. Stat. § 3395. It will thus be seen that the right of the Legislature to fix the maximum rate for passenger fares has been exercised ever since the first general enactment as to railroads, in 1855. The defendant corporation holds its franchise, and enjoys its privilege to do business in this State, under this general railroad law, and for many years has acquiesced in the statute fixing the maximum rate of its passenger fares; nor has it, or any other road in the Lower Peninsula, complained of the distinction made in such law between such roads and the roads in the Upper Peninsula. And in 1870 the people of the State amended the organic law, the Constitution of the State, expressly conferring upon the Legislature the power to fix such maximum rates:

"The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies, whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad." Article 19*a*, § 1.

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This constitutional provision, beyond all doubt, authorizes the Legislature to fix maximum rates with only one limitation, to wit, that such maximum rate shall be a reasonable one; and, in my opinion, the use of the word "different" authorizes the Legislature not only in such legislation to classify the railroads, but to legislate differently for *different* railroads. The argument, therefore, presented by the Honorable William L. Webber, that the legislation under consideration is class legislation, and therefore unconstitutional, has no weight as against this express clause of the Constitution, as I construe it. It must have been the intention of the Legislature in submitting this article, as well as of the people in adopting it, to authorize any reasonable classification of railroads in this State for the purposes of fixing such rates. Not only is this the natural and logical interpretation of the meaning of the word "different," as used in said section 1 of the article, but, as shown by Mr. Webber in his argument, there can be no possible legislation on this subject which will not, if general and treating all railroads the same, operate unequally, and therefore be open to the charge that it benefits one class of railroads at the expense of other classes, and consequently will in effect be class legislation. His argument is, by way of illustration, that, if the Michigan Central trains should be limited to the charge of two cents per mile from Jackson to Mackinaw and from Saginaw to Detroit, it would, of necessity, compel the Grand Rapids & Indiana Railroad also to carry at two cents a mile from Mackinaw south, and the Flint & Pere Marquette Railway to carry at the same rate from Saginaw to Detroit, because of the competition between the roads running in the same direction, and to the same places, and says: "This is class legislation of the worst character." Or, he says:

"Take a more striking illustration. Why should the

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Michigan Central Railroad Company be limited to two cents a mile [its gross earnings being over $3,000 to the mile], the Detroit, Grand Haven & Milwaukee be limited to 2½ cents per mile, and the Detroit, Lansing & Northern be permitted to charge 3 cents per mile between Grand Rapids and Detroit?"

It is made apparent by his own argument that the general law, existing before the amendment of 1889, fixing the maximum rate on all roads in the Lower Peninsula, without classifying them, was also subject to the objection that he makes against the present law as class legislation, because it operated unequally; for, if fixing the rate at two cents upon one class of roads would force, as claimed by Mr. Webber, competing roads whose gross earnings did not reach $3,000 per mile, of necessity, also to reduce their rates to two cents, thus operating unequally, and being legislation benefiting one class more than another, or hurting one class more than another, and therefore, as he deduces, class legislation, then a *three-cent* rate applied to all the railroads is open to the same objection, for, if it is unfair and unequal to force all the railroads to a two-cent rate, because some can better afford so to limit their charges than others, then it is unfair and unequal, for the same reason, to force a general limit of three or any other number of cents per mile. And this inequality and injustice exists just the same under a general law as it does when forced by the necessities of competition. It fact, Mr. Webber's whole argument makes it clear that no general law can be passed fixing the maximum rates on all roads alike, without reference to cost of construction or service, the amount of their business or income, and their indebtedness, which will not give some roads undue advantage over others. See, also, *Railroad Co. v. Iowa*, 94 U. S., at page 164. Therefore, it seems to me, the Legislature

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in submitting, and the people in adopting, this amendment, knowing that all general legislation in this regard must, in its consequences, operate in a certain sense as class legislation, wisely used the word "different" to signify, as it naturally does, that the Legislature in this matter was granted power to make distinctions in legislation between the different railroads of this State, if such distinctions are reasonably made.

And the distinction between the roads of the Upper and the Lower Peninsula must be considered, in the absence of any showing to the contrary, to be a reasonable one. We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the Upper Peninsula is much greater than that in the lower, owing to the marked physical difference between them in the character and face of the country. This distinction has been carried in the railroad law of the State for over 17 years; and distinctions in the legislation, upon many matters, between the two peninsulas have been constant and frequent ever since the Upper Peninsula has been a part of Michigan. And the Constitution of 1850 provides differently for the two sections of the State in regard to what the Legislature may do as to the pay of its members from the Upper Peninsula. Article 4, § 15. It provides also for a different disposition of the specific taxes from mining companies in the Upper Peninsula from other specific State taxes. Article 14, § 1; Article 19, § 7. This portion of the State is also treated by itself in article 19, and provisions there made as to its courts and other matters. It is true that Article 15, § 1, of the Constitution of 1850, prohibits the formation of any corporation in this State, except for municipal purposes, by any other than general laws. And this provision of

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the Constitution was no doubt rightfully interpreted by this Court in *Nelson v. McArthur*, 38 Mich. 207, where it is said that—

"The great purpose of the provision was to introduce a system of legislation in regard to the institution of corporations, which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure as far as practicable for all the people of the State an equality of opportunity, and a guard against sectional discriminations."

But the amendment known as section 1 of article 19*a* was adopted in 1870, and must be considered as qualifying and modifying the letter, as well as the spirit, of Article 15, § 1, as regards legislation fixing the maximum of freight and passenger rates. It therefore follows, in my view of section 1, Art. 19*a*, of the Constitution, that the Legislature had not only the power to make the distinction it did as to the two peninsulas of our State, but to classify the different railroads upon the basis of their gross earnings.

But in regard to the latter classification, we are not without light from our own and other courts. In the first place, all roads earning the same amount per mile are treated alike, and there is therefore no distinction between them, if the gross earnings of the railroad furnishes a proper and reasonable basis for legislation of this character. Mr. Meddaugh, of counsel for the defendant, in his brief makes no complaint against the right of the Legislature to make this classification, if they have the right to legislate at all upon the subject; and, in arguing against the constitutionality of the distinction between roads in the Upper and Lower Peninsula, he says in his brief:

"There is no excuse for confusing in the mind the power of the State to classify all railroads for passenger

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and freight rate purposes, with reference to their earnings, with that of making a territorial division of the roads for the same purpose, for the two are essentially dissimilar in character. By the former, all roads similarly circumstanced in respect of earnings are treated alike, while by the latter they may be, as here, treated very unlike. It is this distinction that lies at the very foundation, and constitutes the reason, of the constitutional provision and the constitutional principle I am urging against this act."

Mr. Kirchner, also of counsel for the defendant, argues that the act is not reasonable because based upon the *gross* earnings, regardless of its operating expenses, when the operating expenses, although they did not do so in 1888, may in the future years exceed the gross receipts. Mr. Webber, not of counsel, but who, on his request, was permitted to file a brief in the case, objects to the classification of roads in reference to their gross earnings, on the ground that there are no reasonable maximum rates contemplated in this classification. It does not purport to be based upon the theory that railroad companies have earned more than reasonable compensation. Such a classification is purely arbitrary, he claims.

"It has no relation to the cost of the service; it is immaterial whether the road cost $20,000 per mile or $40,000 per mile; it is immaterial whether the terminal facilities have cost millions of dollars to the railroad companies, or hundreds only. These questions are all ignored. And without reference to whether the income of the past has been such as to enable the company to pay its interest, or whether the balance is on the wrong side of the ledger, it fixes the limitation purely with reference to the gross income from passenger trains, without reference to cost of service."

It seems to me that a classification according to gross earnings is the fairest and most reasonable method of classification.

Why should a corporation which is more economical

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than another in the matter of expenses be at a disadvantage in the law over one that is extravagant? And why should a corporation out of debt be adjudged entitled to charge less for its services than one heavily in debt? As was well said on the argument, it would be a strange ordinance of a city that would regulate the amount of fare to be charged by a hackman by the cost of his team and carriage, and take into consideration the debts he owed, and the interest that he was paying. And yet, if railroads are to be regulated or controlled in the matter of fares by the Legislature, upon what principle must they be classified in accordance with their net earnings, and their indebtedness taken into consideration, which does not govern also the imposition of rates upon hackmen? One is a common carrier as well as the other. Both may be said to have privileges granted them by the government which authorize a reasonable regulation of their charges; but the privileges of a hackman sink into insignificance when compared with the franchise and privileges granted to railroad corporations. And yet no one has ever contended that a hackman could interpose the cost of his team and carriage, or his indebtedness upon them, against the reasonableness of the restriction of his charges. A classification according to the amount of business done per mile seems to me to be the fairest and the most reasonable classification, if railroads are to be classed at all, in the fixing of the maximum rates; and this method of classification is not unusual, and has been sustained in a variety of cases. A law classifying railroads for taxing purposes according to their income was held constitutional in *Railroad Co. v. Gibbes*, 27 S. C. 385 (4 S. E. Rep. 49). A law classifying business for taxing purposes is constitutional. *Manufacturing Co. v. Wright*, 33 Fed. Rep. 121. A law classifying insurance companies for taxation according to the premiums received

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was held valid in *State v. Insurance Co.*, 40 La. Ann. 463 (4 South. Rep. 504). In *Walcott v. People*, 17 Mich. 68, it was held that the Legislature had the power to tax the business of an individual engaged in carrying express according to the gross earnings of the business. Mr. Justice CAMPBELL dissented, upon the ground that sections 11 and 12 of the article of the Constitution on finance and taxation declare that "the Legislature shall provide a uniform rule of taxation, except on property paying specific taxes;" and that "all assessments hereafter authorized shall be on property at its cash value;" and that, the Constitution pointing out the cases in which specific taxes might be levied, which did not include the case in hand, such taxation was therefore forbidden by the Constitution in the case then at bar. There is, however, no intimation in such dissenting opinion that such a listing for taxation was unjust or unreasonable. In *Youngblood v. Sexton*, 32 Mich. 414, involving the constitutionality of the liquor law of 1875, the validity of the tax was assailed on the ground that it was not levied on any principle of equality or uniformity, and therefore was wanting in one of the essential elements of taxation under our Constitution. Mr. Justice COOLEY, in disposing of this point, said:

"If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the Legislature, and not us. Courts cannot annul tax laws because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever; for there never yet was a law that was not more or less unequal and unjust in its practical workings."

The same may be said here. There can be no classification of railroads for the purpose of fixing maximum

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rates for carriage that will not operate more or less unequally upon different railroads, and be unjust to some of them so classified. To argue that the Legislature cannot make any classification which operates unequally is to argue that the Legislature can make no classification at all. And if no classification can be made, and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly, because some companies are to less expense than others in the same length of road by reason of the nature of the country through which they run; some have costly terminal facilities, and some have not; some owe large amounts, and some do not; and some do a large amount of business, and some do not. The matter, then, resolves itself to this, which is in fact the main argument, to which all these collateral lines of discussion by the defendant's counsel run and connect: That the Legislature has absolutely no power to interfere with or regulate the fixing of tolls by the railroad companies of this State. This view of the case, however, cannot be considered in the light of our Constitution, as heretofore shown. The legislature of Iowa, in 1874, enacted as follows:

"All railroads in this State shall be classified according to the gross amount of their respective annual earnings within the state per mile for the preceding year, as follows: Class A shall include all railroads whose gross annual earnings per mile shall be $4,000 or more. Class B shall include all railroads whose gross annual earnings per mile shall be $3,000, or any sum in excess thereof less than $4,000. Class C shall include all railroads whose gross annual earnings per mile shall be less than $3,000."

The statute also provided that railroads in class A should charge not to exceed 3 cents per mile; class B, not to exceed 3½ cents per mile; and class C, not to exceed

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4 cents per mile. The constitution of Iowa provides, what ours does not, that "all laws of a general nature shall have a uniform operation." The case went to the Supreme Court of the United States, and is found in 94 U. S. 155. (*Railroad Co. v. Iowa.*) It was held, in spite of this constitutional provision, and also of another, to wit:

"The general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens,"—

That this legislation was valid. The Court said:

"The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires."

This latter clause of the Iowa constitution is not found in ours; neither did the constitution of that state directly authorize the passage of laws fixing maximum rates, as does ours, in article 19*a*.

The statutes of Arkansas fixed the passenger rates on lines of railroad 15 miles or less in length, eight cents per mile; 15, and less than 75, in length, five cents; and on lines over 75 miles in length, three cents. In *Dow v. Beidelman*, 125 U. S. 680 (8 Sup. Ct. Rep. 1028), the Supreme Court of the United States upheld this legislation, and said:

"The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done, or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the direction of the legislature. If the same rule is applied to all railroads of the same class, there

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is no violation of the constitutional provision securing to all the equal protection of the laws."

The Iowa case was cited and approved. It was shown in *Dow v. Beidelman* that the cost of construction of the railroad was $4,000,000, and that the company's indebtedness, bonded, was $2,850,000. The net income for 1886 was $162,000, earned principally from passenger traffic at five cents per mile. The law under consideration would reduce such net income to $58,000.

But it is contended that the reasonableness of such a classification was not raised before or determined by the Supreme Court of the United States in any of these cases, but simply the power of the legislature under the different state constitutions to do so. But, if this is so, we are then left to interpret our own Constitution and the Federal Constitution without the light of that Court upon the subject. As has been already said, I think the classification adopted a fair and reasonable one, nor does it appear to me to conflict, if reasonable, with the provision of the State and National Constitutions, that no person "shall be deprived of property without due process of law." But in *Dow v. Beidelman, supra*, it was claimed that the legislation there under consideration would reduce the net income so that the company would be able to pay less than 1½ per cent. on the cost of its road, without paying any interest on the bonded debt. If it was applied on the interest of such debt, which was bearing interest at 8 per cent., it could only pay a little over 2 per cent. upon such debt. This seems to have raised the question of reasonableness. But the Court said, and the opinion was not dissented from by any member of the Court:

"The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They

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argue that it is so in this case by reason of the admitted fact that, with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent. on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation, or its trustees. It certainly cannot be presumed that the price paid at the sale, under the decree of foreclosure, equaled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation, or its trustees, the Court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile, fixed by the legislature, is unreasonable. *Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.*" 125 U. S. 690, 691.

The conclusion, then, is that the Legislature has the power, under the constitutional provision contained in article 19*a*, and also independently of it, as shown by the cases cited, to classify the railroads of this State, as it has, according to the amount of business done, and also as to their location in the Upper and the Lower Peninsula.

Another contention is that this legislation is invalid because it violates the contract which was entered into between the State and this railroad corporation when it organized under the general laws of this State. Mr. Meddaugh, in his brief, says:

"Railroad corporations organized under general laws of Michigan take their being under an implied contract that the State shall not reduce their tariff of passenger and freight rates, either in the exercise of its common-law powers or the constitutionally reserved power to repeal, alter, or amend, so as to deprive these corporations of the ability to earn a reasonable profit on the capital

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invested. And the act in question clearly violates this principle."

The defendant corporation, as appears by its own bill of complaint filed in this Court in *Chicago & Grand Trunk Ry. Co. v. Turner*, 79 Mich. 133, was incorporated under our laws by the consolidation of different railroads. This consolidation and incorporation took place after the adoption of article 19*a*, to wit, as shown by its report to the Railroad Commissioner, April 1, 1880. The companies thus consolidated were five, three of whom had lines within this State, to wit: Michigan Railway Company, of Michigan, running from Michigan and Indiana state line to Lansing, Mich., incorporated January 7, 1880; Chicago & North Eastern Railroad Company, running from Lansing to Flint, incorporated August 12, 1874; Northwestern Grand Trunk Railway Company of Michigan, running from Flint to Port Huron, incorporated August 26, 1879. Each one of these, it will be seen, was also incorporated after the constitutional enactment, and also subsequent to the general revision of 1873. It is claimed by Mr. Webber, in his brief, that the proper construction of the phraseology of the statute under consideration does not—

"Subdivide the railroads of Michigan in accordance with the original charters under which the roads were constructed. It applies to railroad companies operating passenger trains; it does not apply to railroad companies not operating passenger trains. To illustrate: The Grand River Division of the Michigan Central Railroad was built, under a special charter, as the 'Grand River Valley Railroad Company;' yet the Grand River Valley Railrand Company operates no passenger trains, and makes no report of passenger earnings. The road is operated by the Michigan Central Railroad Company, and the Michigan Central Railroad Company reports the passenger earnings for this road; and it is the Michigan Central Railroad Company, as to the mileage of this division, which is the company 'whose passenger trains,

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reported as aforesaid,' earn the money. Every railroad in the State having now any considerable mileage is made by a union of companies,—that is, different portions of the road were constructed under separate and different charters,—but the ownership of the passenger trains, and the practical ownership and control of the railroad, is vested in the company which operates it; and this law under consideration, when it says. 'All companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads,' must have reference to the companies operating the railroads, and it cannot be held to apply separately to each particular corporation, whether general or special, by authority of which the road was originally constructed."

I think this construction is the correct one. Consequently this defendant, the Chicago & Grand Trunk Railway Company, must stand upon its own incorporation in this State. The law is aimed at it, and not at the separate corporations which it has absorbed, and which no longer exist, as far as this statute is concerned. Therefore, when it came under the provisions of our laws, and accepted the privilege of doing business in this State, it came in under a Constitution expressly authorizing the Legislature to alter the rates, with only the limitation that all legislation in such direction should be reasonable. This ends the question as to the violation of any contract, implied or otherwise. The Constitution prevails; and, as long as such provision remains therein, I deny the right of one Legislature expressly or impliedly to contract away the right of the people, through another Legislature, to enforce this provision of the Constitution by such legislation as to them may seem proper, provided it is reasonable. This view renders it unnecessary to discuss what might have been the rights of the defendant had it been organized, and operating passenger trains in this State, before the adoption of this article of the Constitution.

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The right of the Legislature to fix the maximum charges of rates upon railroads, if such rates are reasonable, under the Federal Constitution, has been frequently sustained by the United States Supreme Court. *Munn v. Illinois*, 94 U. S. 113; *Railroad Co. v. Iowa*, Id. 155; *Peik v. Railway Co.*, Id. 164; *Railroad Co. v. Ackley*, Id. 179; *Ruggles v. Illinois*, 108 Id. 526 (2 Sup. Ct. Rep. 832); *Stone v. Trust Co.*, 116 Id. 307 (6 Sup. Ct. Rep. 334); *Dow v. Beidelman*, 125 Id. 680 (8 Sup. Ct. Rep. 1028); *Banking Co. v. Smith*, 128 Id. 174 (9 Sup. Ct. Rep. 47); *Railway Co. v. Minnesota*, 134 Id. 418 (10 Sup. Ct. Rep. 462). I shall not attempt to analyze these decisions separately. This has been well done by the briefs on both sides. It is probably true that there have been some fluctuations in the opinions in the different cases, but the power of the legislature *reasonably* to regulate and control railroads as to their carrying rates has not been denied in any of them, and has, in my opinion, been lately affirmed in the case of *Railway Co. v. Minnesota, supra* (decided March 24, 1890). The majority opinion in the case of *Munn v. Illinois*, the first of the series, holds that the reasonableness of such legislation is a question for the legislature to decide, and not for the courts. At page 133, 94 U. S., the Chief Justice says:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a *judicial*, and not a legislative, question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum, beyond which any charge made would be unreasonable. Undoubtedly in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has

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no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge as one of the means of regulation is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

Justice Field, now on the bench, dissented. This same doctrine seems to have been affirmed in the Iowa case, 94 U. S. 155, and the Peik case, Id. 164.

There is nothing in any of the other cases in conflict with the idea that the reasonableness of the legislative enactment was to be determined by the legislature, until we reach the case of *Stone v. Trust Co.*, reported in 116 U. S. 307. The state of Mississippi, in 1884, passed an act to provide for the regulation of freight and passenger rates, and created a commission to supervise and fix the same, instead of doing it directly. The commission was authorized to revise the tariffs of the companies, but

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with a view to "the character and nature of the services to be performed," and so as to "allow a fair and just return on the value of such railroad." It will be seen that this act made the value of the road a material factor in determining the rates by the commission. The commission was empowered to receive complaints, cite companies to answer, listen to evidence and arguments, and determine the rates to be charged. By the statute the determination of the commission was to be received by all courts as *prima facie* evidence that such determination was right and proper. See 116 U. S. 312. In the opinion of the Court, Chief Justice Waite cites *Munn v. Illinois*, 94 U. S. 113, and the Iowa case, Id. 155, and says that it was decided in those cases—

"That, as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum, beyond which any charge would be unreasonable, and that such maximum, when fixed, would be binding on the courts in their adjudications, as well as on the parties in their dealings." See 116 U. S. 330.

But the Court, in still further speaking on the subject, said:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which, in law, amounts to a taking of private property for public use without just compensation, or without due process of law."

This is made the text for the decision in the Minnesota case of March 24, 1890, and it is contended by the counsel for the defendant that this last case, reported in 134 U. S. 418 (10 Sup. Ct. Rep. 462), has virtually overruled all the preceding ones, and practically taken away from the legislature, not only the power to determine the reasonableness of the maximum rate it fixes, but the author-

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ity to fix any such rate at all. There is certainly nothing in the decision denying the authority of the legislature to establish maximum rates. We have been presented with the brief of John W. Cary, Esq., of Milwaukee, counsel for the railroad company, filed in the case, in which he takes strong ground, denying that the legislature of Minnesota is authorized to fix by positive law the rates and charges for the transportation of persons and property over lines of railway owned by the defendant company, and holds that, under the Constitution of the United States, it is the right of the company to make, fix, and establish its rates and charges over its railway, subject only to the provision that such rates and charges shall be fair, just, and reasonable. He admits the right of the legislature to fix rates which may govern railroads organized after such legislation, but denies the right of such body to fix the compensation of existing railroads, or other like property, and claims that prior to the legislation in Illinois in 1873, and in Iowa, Wisconsin, and Minnesota in 1874, there was no authority for the exercise of such legislation anywhere, either in English or American jurisprudence or legislation. He attacks the case of *Munn v. Illinois*, and all the cases following it, as unsound and unjust, and insists that the first-named case is not sustained by the authorities cited by Chief Justice Waite to support it. He further says: "We deny that it is a legislative function to adjudicate and determine what are reasonable rates." The question as to whether a given rate is reasonable and fair, when challenged, is for the judiciary. Hence, contending that it is the exclusive right of the railroad companies to fix their rates, limited only by the condition that they shall be fair and just, and, when challenged, it being a question for the courts alone to determine, he deduces that the legislature has no right to fix or establish a maximum rate at all. And

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the Court is distinctly asked to reverse and overrule its previous decisions to the contrary. But it did not do so. It would, indeed, have been a singular action, upon the part of the Court of very last resort in this country, to have overruled a long line of decisions upon a matter conceded to be of the highest importance to the whole people, by implication, and without alluding to the previous opinions of the Court, especially when such reversal was expressly demanded in the argument of the case.

But, in my opinion, we are not left in the dark by this latest decision upon this question. Mr. Justice Blatchford, in speaking for the Court, in answer to the argument that a contract existed that the company should have the power of regulating its rates of toll by its charter; and that any legislation by the state infringing upon that right impairs the obligation of that contract; and that there was no provision in the charter, or in the general statute, reserving to the state or territory the right to alter or amend the charter; and that no subsequent legislation of the territory or state could deprive the directors of the company of the power to fix its tolls, subject only to the general provision of law that such rates should be reasonable,—says:

"But we are of opinion that the general language of the ninth section of the charter * * * cannot be held to constitute an irrepealable contract with that company that it should have the right, for all future time, to prescribe its rates of toll, free from all control by the legislature of the state. It was held by this Court in *Railroad Co. v. Miller*, 132 U. S. 75 (10 Sup. Ct. Rep. 34), in accordance with a long course of decisions both in the state courts and in this Court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the state, and to such changes as may be made in such general law, *and subject to future constitu-*

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tional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved; and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear with express words. * * * In *Stone v. Trust Co.*, 116 U. S. 307, 325, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a state *reasonably* to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature, unless by words of positive grant, or words equivalent in law; and that a statute which grants to a railroad company the right, 'from time to time, to fix, regulate, and receive the tolls and charges by them to be received for transportation' does not deprive the state of its power within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the Court said (page 331).

"'From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which, in law, amounts to a taking of private property for public use without just compensation, or without due process of law.' There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid." 134 U. S. 454.

The case was presented to the courts in this way: The legislature of Minnesota created a railroad and warehouse commission, consisting of three persons, appointed by the governor and confirmed by the senate. The

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statute in relation to this commission, and regulating common carriers, provides that—

"All charges made by any common carrier * * * for any service rendered, or to be rendered, in the transportation of passengers or property, * * * shall be equal and reasonable, and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

If the commission find at any time that any of such charges are unequal or unreasonable, it is granted power, and is authorized and directed, to compel any common carrier to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable." Upon complaint that certain charges of the defendant company for conveying milk were unequal and unreasonable, the commission proceeded to investigate, and found that such charges were unequal and unreasonable, and declared that a rate of 2½ cents per gallon in 10-gallon cans was an equal and reasonable rate for such service. The company was charging and receiving 3 cents per gallon for the transportation. The commission thereupon directed the defendant company to carry the milk for 2½ cents per gallon. The company refused to comply with this direction. The commission, through the attorney general, then made application to the supreme court of Minnesota for a writ of *mandamus* to compel the company to obey the direction. The company returned to the alternative writ, which was issued by the court, certain constitutional objections, and also that the rate of 3 cents per gallon was a reasonable, fair, and just rate; and that the rate fixed by the commission was not a reasonable, fair, or just compensation to the company for the service rendered; and that the establishing of such rate by the commission, against the will of the company, was, *pro tanto*, a taking of its property without due process of law.

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Upon the hearing, the court refused to take testimony on the issue as to whether the rate fixed by the commission was reasonable, fair, and just, and issued a peremptory writ. The Minnesota supreme court held that the intention of the legislature was not that the rates fixed by the commission should be merely *prima facie* equal and reasonable, but *final* and *conclusive* as to what are lawful or equal and reasonable charges. The court held that there was therefore no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. 38 Minn. 281 (37 N. W. Rep. 782). This is a brief but substantial statement of the case. The Supreme Court of the United States, holding that they must accept this construction of the statutes by the state court as conclusive, was of the opinion that, so construed, it was in conflict with the Constitution of the United States, in that it deprives—

"The company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

The Court further says:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without

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due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

This is the whole substance of the decision. It will be noticed that the Court does not, except by implication from the language last above quoted, deny the right of the legislature itself to determine the reasonableness of the rates of which it may fix the maximum. *Munn v. Illinois* and the other cases are not expressly overruled in this regard. And the case still holds to the doctrine that the state may fix such maximum rates, and at best can only be claimed to decide that when the fixing of such rate is delegated to a commission, and the reasonableness of the rate fixed by such commission is attacked, the question of such reasonableness is one to be determined by the courts. And it is evident that the Court held also that it was competent for the legislature to create this commission, and that such commission had power to fix rates, provided such rates were equal and reasonable, as the opinion concludes as follows:

"In view of the opinion delivered by that court [supreme court of Minnesota], it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a *mandamus*, if the court should adhere to its opinion that, under the statute, *it cannot investigate judicially* the reasonableness of the rates fixed by the commission; still the question will be open for review."

An order was accordingly made, thus intimating clearly that if, upon judicial investigation, the rates fixed by the commission should be found equal and reasonable, the commission should be sustained in its finding and direction. Upon an examination of the facts and the opinion in this Minnesota case, and the cases heretofore cited,

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beginning with *Munn v. Illinois*, it is clear to us that the Supreme Court of the United States has not overruled the case of *Munn v. Illinois* and the others following it and cited in this opinion; and that the decision in the Minnesota case rests, not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so. The substance of this last decision is that whether or not the rates established by such commission are reasonable is a question for the courts, and not for the commission, to determine, as such commission has no means or power to carry on an investigation, and "cannot, in view of the powers conceded to it by the state court, be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." There is a vast difference between the action and authority of a commission appointed by the legislature and the action and authority of the legislature itself,—the sovereign law-making power of the state. There are many things that a legislature can do that it cannot delegate to any other body; and, it would seem, in the opinion of the Supreme Court of the United States, that this is one of them.

And now to the case in hand. The Constitution of this State, enacted, as before said, before the organization of this defendant corporation, has given the Legislature power to, from time to time, pass laws establishing reasonable maximum rates of charges for railroad transportation. Who is to judge of the reasonableness of such legislation, of the rates so fixed? Is it to be decided by the courts not only upon each separate act of the Legislature, but also in the case of every railroad company, and also in the case of every person who brings suit for a violation of the law against such company? If so, the courts will not fail of business, nor will the result of a determination of facts by juries, to which the court must apply

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the law of reasonableness, be always harmonious or consistent. For instance, a railroad company, at the suit of one person, may establish that a certain rate is unreasonable, and, at the suit of another person, the same rate may be determined to be reasonable. The question will ever be open, and never closed. The result of such investigation may be different at one time than it might at another, as the facts generally and commonly understood to enter into the reasonableness of a given rate are liable to change each year, and perhaps each quarter of the year. The result will always be shifting and uncertain, and the determination in one suit will not bind in another, unless the parties are the same. We think the intention of the people in this constitutional enactment was to authorize the fixing of reasonable maximum rates exclusively by the Legislature. Then the result is certain and definite. The law is known, and there is no necessity for litigation, and there can be no different determination in like cases. If injustice shall be done by the Legislature, the remedy lies in the good sense of the people, and not in the courts. It would not be proper for this Court to presume that the people intended by the use of the word "reasonable" in this constitutional provision to authorize the courts to determine that which they have by such Constitution solemnly committed to the Legislature. It would be to presume that they intended to grant in fact the establishing of these rates to the courts, instead of to the Legislature, because, if it is for the courts to declare what is reasonable, the courts in effect fix the rates in the end.

In this view of the case, the circuit court was right in its judgment, and the same is affirmed, with costs.

CHAMPLIN, C. J., and LONG, J., concurred with MORSE, J.

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CAHILL, J. I concur with my Brother MORSE in the result reached in this case. The importance of the questions involved will justify me in stating some additional reasons that have occurred to me as supporting the position the Court has taken, that the right to establish reasonable maximum rates of charges for the transportation of passengers and freight by railroads is, under our Constitution, vested in the Legislature, from whose judgment, as expressed in laws legally enacted, there is no appeal except to the people. I should entertain this view independent of the constitutional amendment of 1870. Const. Art. 19*a*. Section 1, Art. 15, of the Constitution, authorizing the formation of corporations under general laws, provides that all such laws may be altered, amended, or repealed. The defendant accepted a charter under a general law passed in pursuance of this constitutional power. Under such law and charter it has availed itself of the extraordinary power of exercising the right of eminent domain, and to occupy for its uses the public highways of the State. The acceptance of a charter on such terms as were prescribed by the Constitution and laws, and the acquisition of important property rights and franchises by virtue of powers therein granted, amounted to a consent on its part to legislative control. In so far as its property is affected by it, it is by its own act of consent, and not by "due process of law." There is, in my opinion, no need, under our Constitution, of basing the right of legislative control of railroads upon any presumed dedication of their property to public use, growing out of the interest which the public has in such property, and the manner of its use. That presumption has been held sufficient to support such right by the Supreme Court of the United States in the Granger cases. *Munn v. Illinois*, 94 U. S. 113, 126. In this State a railroad com-

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pany needs to make no dedication of its property to public use, because it takes its property and franchises in the beginning charged with the incumbrance of legislative control. When it acquires life, it by the same act submits to limitations. This creature of the law consents to be born and to assume its functions knowing that its life and fortunes are intrusted to the discretion of its creator.

It is not contended by counsel for defendant that the State has no control over the rates of charges it shall make for the carriage of passengers. It is conceded that it can be required to charge only reasonable rates. But it is contended that the determination of what is reasonable is a judicial, and not a legislative, function. Under our Constitution it is the Legislature that has power to create corporations, and have them under control. No such power is vested in the judiciary in any sense different from that it has over natural persons. Nor is there anything in the power to be exercised that is essentially judicial. So far as the right has been exercised to regulate the charges of trucks and drays in cities, of wharfs, turnpikes, bridges, canals, grain elevators, ferries, and mills, the rates of interest for the use of money,—and it has been exercised in all countries so long that the memory of man runneth not to the contrary,—it has been done by legislation, and I know of no case where the matter has been referred to the courts. The legislature has peculiar advantages for arriving at a correct judgment as to what charges are reasonable, not possessed by the courts. A correct judgment can only be formed or approximated after a careful study of many facts concerning the cost of building and operating a road, the extent of its business and earnings. The Legislature can and has provided the machinery for collecting this information through the Commissioner of Railroads. Act No.

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79, Laws of 1873. The courts have no means of accumulating this information. If anything were needed to demonstrate that the question of the reasonableness of rates of fares was legislative, rather than judicial, the record in this case would go far towards doing so. The plaintiff claims to have been injured to the extent of $1.60. To redress this grievance he brought this suit, and the defendant's position is that it has the right to show that the fare tendered was unreasonable in amount, reference being had to all the facts that must affect the question. If the contention of the defendant be admitted, and the question of reasonableness be tried and determined by the courts, nothing is settled by it except the question of the plaintiff's right to the small sum claimed as damages. No principle is or can be settled in this suit that will necessarily govern in other suits of a similar character, because the facts and circumstances that affect the cases may and usually must be somewhat different. In a court of law every case must stand upon its own facts, and neither party to a suit could be concluded by the judgment in a former suit to which they were neither parties nor privies. If, then, the reasonableness of a fare is a judicial question, to be settled only in a suit at law by the person aggrieved, the public is practically without remedy, as the costs and expenses of the litigation must inevitably exceed any possible recovery. It may be said with some force that this circumstance ought not to control or have much weight in determining a question of right; but, keeping in view the admitted fact that the power of control must rest somewhere, the practical facilities, on the one hand, and difficulties, on the other, are considerations that might properly weigh with those who were settling, in the formation of a Constitution, a method of governmental control.

Nor do I think that the constitutional amendment of

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1870, before cited, which expressly provides that "the Legislature may, from time to time, pass laws establishing *reasonable* maximum rates of charges for the transportation of passengers and freight on different railroads in this State," is more than declaratory of a power that already existed. The argument that the use of the word "*reasonable*" in the amendment makes a judicial question out of what was without it a legislative question seems to me to be without force. The amendment of 1870 was neither a great nor a limitation of power. It was a declaration of power already reserved in the Constitution, and the amendment served only to put beyond question the right of the Legislature, which was before thought to be open to debate. It would be little short of usurpation, it seems to me, for the courts to assume to determine for the Legislature a question which the Constitution has solemnly committed to it. The use of the word "reasonable" may as well be regarded as an admonition to the Legislature as to the courts, and it cannot be assumed that the admonitions of the Constitution will be more sacredly regarded by one branch of the government than another. It seems to be considered by those who argue against legislative control that to concede the power to regulate carries with it the power to destroy. As a question of abstract power this may be true, but it is not truer of legislative than of judicial control. Concede the power, and its abuse is possible.

"All power is subject to abuse, and, if this circumstance is to be taken as an argument against its existence, we are irresistibly driven to results fatal to the existence of all government. * * * All human agencies are fallible, and the wisdom of man has never been able, and never will be able, to devise a system of government incapable of abuse. Every department may exceed its authority or pervert its power. The judiciary

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has no pre-eminent claim to infallibility." GRAVES, J., in *People v. Salem*, 20 Mich. 503.

In my opinion the fear of spoliation by the Legislature is without foundation. That there is a desire on the part of the people to act fairly and to deal justly by the railroads is evidenced by the fact that, at considerable cost, they have established a bureau for the collection of the information absolutely necessary to the formation of a just judgment. That the Legislature may make mistakes is probable; that it may act unjustly in a given case is possible; but that it will in the end pursue a course calculated to cripple or destroy the railroads, those great arteries of trade, on which the commercial life of the people depends, is as unlikely as that a reasonable man will commit suicide.

As evidence that the right to fix the rate of charges for the transportation of passengers and freight by railroads belongs to the Legislature, and not to the courts, I call attention to the fact that the power has been exercised by the Legislature from the earliest history of the State. The Michigan Central charter, granted by special act in 1846, provided that the rate for passenger fares *should not exceed* three cents per mile, and for freight the charges were not to be greater than those upon certain New England roads named. Section 15, Act No. 42, Laws of 1846. The Michigan Southern charter limited the right of the company to such charges as were authorized by the State to be taken on January 1, 1846. Laws of 1846, Act No. 113, § 15. The first general railroad law, passed in 1855, contained an express limitation upon the charges that should be made by companies organized under it for the transportation of passengers and freight. Act No. 82, Laws of 1855, p. 160, § 17, subd. 9. See, also, revision of railroad laws (Act No. 195,

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Laws of 1871, p. 336, § 10, subd. 9, 10; Act No. 198, Laws of 1873, p. 506, § 9, subd. 9; Act No. 177, Laws of 1877, p. 188, § 9, subd. 9). The rates of charges as fixed by these several acts, when we consider the cost of railroad construction and maintenance, the extent of the business transacted, and the earnings then, as compared with the present, were lower than the rates fixed by the act of 1889; and yet not only was the right of the Legislature to fix such rates not contested, but the reasonableness of the rates fixed was unquestioned.

No more important question than that involved here has in my judgment been before this Court. The issue is clearly made up, and we are to determine, perhaps for all time, the power of the State over the railroads built under the sanction of its laws. There are candid and thoughtful men, men who love justice and hate oppression, who fear for the result if this great public interest is given over to legislative control, freed from any judicial supervision. I do not join in those fears, but, if I did, I could not change my views of the power which the Constitution has vested in the Legislature over this subject. A legislator who, in the exercise of this great power committed to him by the Constitution, suffers himself to be influenced by any motive except a desire to deal justly between the people and those who, by putting their fortunes into the railroads, have enriched and made prosperous our Commonwealth, is an enemy of the State, and unworthy of citizenship in it.

GRANT, J. I concur in the result under the rule of *stare decisis*, regarding the question as settled by the decisions of the Supreme Court of the United States referred to in the opinion of my Brother MORSE.

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JULIA L. PUTNAM v. MERCY TINKLER ET AL.

Specific performance—Infancy—Laches.

1. The power of the equity court to compel the specific performance of a parol contract to convey land, which has been fully performed by the vendee, is undoubted; citing *Twiss v. George*, 33 Mich. 253; *Kinyon v. Young*, 44 Id. 389; *Lamb v. Hinman*, 46 Id. 112; *Fairfield v. Barbour*, 51 Id. 57; *Welch v. Whelpley*, 62 Id. 15; *Taft v. Taft*, 73 Id. 502.
2. The failure of an infant to file a bill to enforce the specific performance of a parol contract for the conveyance of land to her father, which he fully performed in his life-time, will not prevent her doing so after arriving at full age; citing *Dragoo v. Dragoo*, 50 Mich. 575.

   So *held*, where land was purchased by a father for his son, and the title taken in the father's name, who agreed to convey to the son as soon as he paid the purchase price, which was paid by the son in his life-time, and after his death his father conveyed to a third party, who understood that the land was claimed by the son's widow for herself and infant daughter. The widow filed a bill against her father-in-law and his grantee to enforce the performance of the contract, but before any proofs were taken she quitclaimed the land to the grantee for a consideration paid her by her father-in-law, and surrendered possession to the grantee. She afterwards remarried, and lived near the land with her daughter, who, after attaining her majority, filed a bill for the specific performance of the contract, and her right to such relief was opposed on the ground, among others, that she had lived near the land for many years while the defendant (said grantee) was occupying and improving it as his own, without ever asserting her claim, which ought not to be considered by a court of equity.

Appeal from Barry. (Hooker, J.) Argued October 8 and 9, 1890. Decided December 24, 1890.

Bill for specific performance. Complainant appeals from decree dismissing bill. Reversed, and decree entered for complainant. The facts are stated in the opinion.

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John C. Patterson, for complainant.

James A. Sweezey and *Charles G. Holbrook*, for defendants.

CAHILL, J. The complainant filed her bill in the circuit court for Barry county, in chancery, against Adam Tinkler in his life-time to compel the specific performance of an oral contract for the purchase of the E. ½ of the S. E. ¼ of section 23, of township 3 N., range 8 W., in Barry county, Mich., claiming that Adam Tinkler held the title in trust for her. The case was tried, argued, and submitted to the court below in the life-time of Adam Tinkler, who died before decree, and the suit was revived against his widow and heirs at law, who appear as defendants in this Court.

The complainant is the daughter and sole heir at law of Albert Henry Dodge, who died July 15, 1864, and the rights which she seeks to enforce in this suit were inherited from her father. The contract relied on is claimed to have been entered into between Horace Dodge, as party of the first part, and Albert Henry Dodge, complainant's father, as party of the second part, in the spring of 1860. It is claimed that it was fully performed by Albert Henry, in his life-time, except the payment of a small balance of the purchase price, which was paid, after his death, from the proceeds of a wheat crop growing at the time of his death, and which his father appropriated. It is claimed that in May, 1866, Horace Dodge, in disregard of his contract with Albert Henry, conveyed the land to Adam Tinkler, who, it is claimed, was fully apprised of the rights of complainant in such land as the heir of Albert Henry Dodge.

Complainant became of age on November 16, 1884, and this bill was filed September 11, 1886. The case was heard before the Honorable Frank A. Hooker, circuit

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judge, who filed a written opinion, which is printed in the record, from which it appears that he found all of the material facts contended for by complainant established by the evidence, but held that a decree such as complainant asked would be inequitable under the circumstances, and dismissed complainant's bill. Complainant appeals.

I have read the record and briefs of counsel with great care, and have reached the following conclusions upon the points necessary to establish complainant's case:

1. That a contract, which, if in writing, would have been valid, was entered into in the spring of 1860 between Horace Dodge, the father, and Albert Henry Dodge, the son, by which it was agreed that Horace should buy the land in question, and hold the title until such time as Albert Henry should be able to pay the purchase price; that the latter was to have time to pay from the proceeds of crops raised by him on the farm; and that when the purchase price was paid Horace was to give Albert Henry a deed. This agreement is established by the testimony of Mrs. Thompson, complainant's mother, Orson Dodge, son of Horace, Elmira Benham, Seymour Andrews, Charles Andrews, and Peter Althouse, and is not disputed by any witness. It is also corroborated by many circumstances.

It appears that in the spring of 1860 Albert Henry Dodge, being then a minor, had become restless at home, and desired to go west; that his father and mother were much opposed to his leaving home, and told him that if he would remain they would buy a farm, and give him his time to pay for it from crops which he should raise upon the land. With this in view Horace and his son, Albert Henry, went to look at the land in question, which was owned at that time by Sherman Shattuck. At this time Albert Henry was engaged to be married to complainant's mother, and expected soon to be married. She went with

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him, accompanied by his father and mother, to look at the land, and, all parties being satisfied with it, Horace negotiated with Mr. Shattuck for the purchase of it, saying that he desired it for his son, Henry. The price being agreed upon, Horace offered to pay a part down, and to take a deed to his son, Henry, who would give a mortgage for the balance. Mr. Shattuck objected to conveying the land to Henry, because he was not yet of age, whereupon Horace said he would take the deed in his own name and execute a mortgage back, and then he could deed to Henry when he had paid for the land. This was done, and immediately thereafter Henry began work upon the place. It was mostly new land, there being only a small clearing and a small log house upon it. The summer of 1860 was devoted to clearing land and getting it ready for crops. A small crop of potatoes and bagas was grown that season. In February, 1861, Albert Henry was married to complainant's mother, and went to live on the place. Before his death he had cleared about 30 acres, built fences, a log stable, dug a well, and set out an orchard. He also paid the taxes. In the spring of 1864 Albert Henry was seized with consumption, and died in July following. When he became unable to work, in the spring of 1864, he rented the farm to Perry Hewitt, who remained there about a year and until complainant's mother, after her husband's death, moved back, in the spring of 1865. She received from Hewitt a share of the crops as rent.

2. I am satisfied that the contract was fully performed by Albert Henry, in his life-time, not only by the payment of the purchase price, except a small balance of $30, which was paid soon after his death, but also by conforming to the wishes of his father in giving up his plans for going west, and in settling down on a farm near home in accordance with his desire. These facts

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are abundantly established by the testimony of the witnesses already named and by Perry Hewitt. The evidence shows that crops of wheat were raised in 1862, 1863, and 1864, aggregating more than 600 bushels; that wheat in those years brought two dollars and upwards per bushel; that all of the wheat so raised was turned over to Horace towards paying for the place, except the small amount needed by Henry for his family and for seed. It was shown that the notes given with the mortgage to Shattuck were taken up by Horace, and by him handed to Henry as paid. These notes were produced at the hearing by Mrs. Thompson, former widow of Henry, who testified that her husband handed them to her when he received them, and that she had always kept them. It also appeared that at the time Henry lay sick in his father's house, and a few days before his death, he called his father to him and wanted him to give him a deed of the place. There were present at this interview complainant's mother and Mrs. Benham, and they testified that Horace, at that time, admitted that Henry had paid for the place except about $30, and that the wheat crop just then ready to be harvested would pay the balance and leave some for Henry. Charles Andrews testified that he had a conversation with Horace a few days before Henry died. He says:

"I talked with uncle Horace, at Henry's request, in regard to his having a deed, and he said: 'We are pressed with work now. Henry is not able to go down if he wanted a deed made. However, if Henry should be suddenly taken away, I will do by his wife and little one the same as though Henry had lived.'"

He further testified that he heard Horace say soon after Henry's death that the crop of wheat they had just threshed would finish paying for the place and have a little left. Seymour Andrews testified:

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"I was there the day after Henry died. Mr. Dodge was feeling pretty bad, and he said: 'Poor boy. This is too bad. He has killed himself with hard work to pay for that place. This crop of wheat would have paid for the farm and left him some money.'"

Mrs. Benham testified that Henry died on Saturday; that she was at his father's house on the Friday before.

"As I came in I saw Henry crying, and I went up to him and I said, 'Henry, what's the matter?' His father was standing right by him, and his mother also, and his wife. Horace said to me that he wanted the writings done about that place; that was why he was crying. Horace told him not to worry; that everything should be done just as he had agreed with him. * * * He told the exact amount that was back on the place; but I can't recollect. I think it was between twenty and thirty dollars, and he said that the wheat crop that was then on the ground that Henry had put in would more than pay up for the place and all of Henry's indebtedness."

The contract, and its full performance by the vendee, being thus clearly established, the power of the court to compel a performance by the vendor is undoubted. Section 6183, How. Stat., provides as follows:

"Nothing in this chapter [the statute of frauds relating to conveyances and agreements as to land] contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance of such agreements."

This power has many times been exercised by this Court in cases closely resembling this, as it was at the death of complainant's father. *Twiss v. George,* 33 Mich. 253; *Kinyon v. Young,* 44 Id. 339; *Lamb v. Hinman,* 46 Id. 112; *Fairfield v. Barbour,* 51 Id. 57; *Welch v. Whelpley,* 62 Id. 15; *Taft v. Taft,* 73 Id. 502. From this it follows that Albert Henry Dodge would have been entitled, had he lived, to have filed this bill against his father, or against Mr. Tinkler, his father's grantee, and to a decree

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for a specific performance of the contract of purchase. Has the complainant the same right?

Upon this point it becomes necessary to examine some additional facts. I have said that in the spring of 1865, after her husband's death, the widow of Albert Henry moved back upon the place with complainant, then an infant child. Her husband's brother, Orson, then a boy of about 20, went with her, and during the summer worked the place. In the spring of 1866, and while complainant's mother was still living on the farm, Horace Dodge deeded the land to Adam Tinkler, a neighbor living about three miles distant. Adam Tinkler testified that no money was paid by him at the time the deed was delivered, nor for some time thereafter; that he had agreed to give $1,500 for the land, but that none of it was paid until after a settlement was made with the widow of Albert Henry, as hereinafter shown. He does not explain why no part of the purchase money was paid at the time the deed was delivered, and it must be assumed, in the absence of any explanation of so unusual an occurrence, that it was understood by him that the land was claimed by the widow of Albert Henry and her child, and agreed between himself and Horace that the purchase money need not be paid until some adjustment was reached. Soon after he obtained his deed he went to the land and began work. As soon as his presence there was discovered by Mrs. Henry Dodge she ordered him off, and, when he refused to go, sued him in trespass. Ten suits were commenced by her against him for distinct acts of trespass. About the time this trouble with Adam Tinkler began, the widow purchased, in her own name, an outstanding tax title, for which she paid $50, and there is some claim in the record that in her trespass suit she relied upon this tax title. But about

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the same time, that is to say, on June 12, 1866, she filed a bill against Horace Dodge and Adam Tinkler in the circuit court for the county of Barry, in chancery, setting up the facts in regard to her husband's right to the land, substantially as claimed in this bill, and in which she made no claim under her tax title. She set up the further fact that she had been appointed administratrix of her deceased husband's estate. She set up the conveyance by Horace Dodge and wife to Adam Tinkler, but charged that Tinkler had, at the time of his purchase, notice of her claim and of the fact that she was in possession of the land; that Adam Tinkler had not paid any part of the consideration, but had intruded himself into and upon said premises, and undertook to assume possession thereof, which complainant refused to yield up and surrender; that summary proceedings had been commenced before a circuit court commissioner, at the suit of Horace Dodge against complainant to recover possession of the premises, which were still pending. The bill then prayed for the specific performance of the contract between Horace and Albert Henry Dodge, and that Horace Dodge and wife, or, if they had conveyed to Adam Tinkler, then that Adam Tinkler, be required to release and convey, by proper deed, the lands and premises described to complainant and Julia L. Dodge (who is the present complainant), the heirs at law and legal representatives of Albert Henry Dodge, deceased; and for general relief. The counsel for complainant in that bill appear as counsel for the defendants in this bill.

Defendants, Horace Dodge and Adam Tinkler, filed a joint and several answer, denying the material allegations in the bill, but before any proofs were taken a settlement was made between Mary Melissa Dodge, the complainant in that bill and the mother of present complainant, and Horace Dodge and Adam Tinkler, by which

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Mary Melissa Dodge, for the consideration of $400, paid by Horace Dodge, executed a quitclaim deed on July 8, 1867, to Adam Tinkler, conveying the land in question. Following this agreement Mary Melissa Dodge moved from the farm, and Adam Tinkler went into possession, and has been in possession, personally or by his representatives, ever since. The widow of Albert Henry remarried soon after, and went to live with her husband on a farm near the land in question, where complainant lived until her marriage, in 1881.

It is insisted on behalf of the defendants that, whatever may have been the rights of complainant's father in this land, it would be inequitable to allow her, after the lapse of so many years, to recover this land, for the following reasons:

First. That the payment of the $400 to complainant's mother for her deed in 1867 must be considered as having been made, in part at least, in her interest. In support of this it was shown that complainant's stepfather, Lewis, at his death, bequeathed to her $200, and the inference is sought to be drawn that this bequest was made because complainant's mother had let him have that money. It is sufficient to say that the evidence fails to show any connection between the two transactions. If it did the rights of complainant would not be affected.

Second. It is said that Horace Dodge and Tinkler must have understood when they paid complainant's mother $400, and received her deed and possession of the land, that they were settling all conflicting claims and securing a good title to the land. If it was important, so far as complainant's rights are concerned, to know what they understood, it should be stated in that connection as a fact appearing in the record that the settlement was arranged between counsel for the respective parties; the present counsel for defendants representing Mrs. Dodge,

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and Mr. Mills representing Horace Dodge and Mr. Tinkler. It is not to be supposed that the counsel thus engaged to look after their clients' interests were ignorant of the respective rights of complainant and her mother, or that they advised the parties that a deed from Mrs. Dodge would convey any interest which her infant child might have in the land as her father's sole heir at law. The widow had a homestead right, a dower right, and a tax title. Adam Tinkler testified that Mrs. Dodge claimed under a tax title, which was settled for. Acting, as these parties were, under the immediate advice of counsel, we must assume that they knew what they were buying, and paid accordingly.

Third. It was shown that there were matters of unsettled account between Horace Dodge and Albert Henry growing out of exchange of work, the payment of some store bills, the expenses of the latter's last illness, funeral expenses, etc. Standing to Henry's credit in such account was the fact that he spent some of his time after he became of age working for his father, and that the latter had and disposed of all the crops raised by Henry on his own place above that part retained for his own use. How this account stood the record does not disclose, and the scant showing on the subject does not justify the importance given to it by the circuit judge. To allow this circumstance to defeat complainant's right we must assume, without proof, that a balance was due to Horace from Albert Henry's estate which would have been a charge against this land, and would have justified Horace in refusing to perform his contract until he was paid. The proof is clear and convincing that the land was paid for. The evidence as to the state of their other accounts is lacking.

Fourth. It is said that complainant lived near this land for many years, and saw defendant Tinkler making

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his improvements, and using the land as his own, without ever asserting her claim, and that her claim ought not now to be considered by a court of equity. Laches are not to be attributed to an infant. *Dragoo v. Dragoo*, 50 Mich. 575. The law assumes that complainant was ignorant of her rights during her minority. Nor can the neglect of her mother to act for her deprive her of any right under the statute. How. Stat. § 6022. Complainant succeeded to the right to enforce her father's contract. She had a right to sue Horace Dodge at law for damages for breach of the contract, or in equity to compel its specific performance. Before she attained her majority Horace Dodge had lost his property, and died, leaving no estate. If she is denied relief under her present bill, she is deprived of all remedy. We cannot, for the sake of guarding Mr. Tinkler or his estate from his own folly, refuse to extend to complainant the protection which belongs to every infant as the peculiar ward of the court.

The bill prays that an account may be taken of the rents and profits of the land during all the time complainant has been deprived of it, and that the defendant may be decreed to pay to her the amount justly found to be due. The proofs on this branch of the case are very meager, and do not afford ground for a decree. There is evidence of the annual rental value of the land, varying from $50 to $75 per annum. There is evidence also of taxes paid and of improvements made by defendant, the amount and value of which is left uncertain. The defendant was entitled, under his deed from Mary Melissa Dodge, to the possession of an undivided one-third part, that being her dower interest in the land. No reliance is placed here on the tax title. We do not feel authorized upon this record to more than decree that defendants hold the legal title to the land in question in trust for complainant, and to require them to

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make conveyance and deliver possession thereof to her, as prayed in the bill, except as to the undivided one-third part, the possession and use of which defendants are entitled to during the life of the widow of Albert Henry Dodge, the mother of complainant, now Mrs. Thompson. If complainant is not satisfied to allow defendants' improvements and taxes paid to offset her claim for rent and profits for the undivided two-thirds of the land, she is given leave to apply to the circuit court for a reference to take proofs and state an account of such rents and profits, and of the improvements made and taxes paid by defendants, and report the same to that court for its action.

The complainant will recover the costs of both courts.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MORSE, J., did not sit.

SIMON N. BALDWIN v. THE CITY OF HASTINGS.

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Municipal corporations—Exemption of property from taxation for fire-department purposes.

1. A provision in a city charter exempting from taxation for fire-department purposes all unplatted parcels of land containing ten or more acres, and used exclusively for farming purposes, is a reasonable and valid one, and cannot be disregarded by the city authorities without a breach of faith, which the courts will not permit.
2. A city charter exempted parcels of unplatted land of a specified acreage, and used exclusively for farming purposes, from taxation for fire-department purposes. The city constructed water-works under the general statute of the State for the purpose of supplying the city and its inhabitants with water, which

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were also used for fire purposes. Taxes were levied upon land falling within the charter exemption to pay interest on the water-works bonds, which the owner paid under protest, and then sued the city to recover back the money, upon the ground that the use of the water for fire purposes exempted plaintiff from paying any portion of the expense of the water supply. In affirming a judgment in favor of the city the Court say:

a—The plaintiff is as much bound to contribute towards the expense of a water supply for all except fire purposes as are other property-owners, and it is not necessary for his protection that he escape his share of this *legal* tax because the city chooses also to furnish water for fire purposes.

b—The city being authorized to raise a tax for fire purposes, and the treasurer being required to keep the several funds separate, and to pay every warrant out of the particular fund upon which it is drawn, and the fund raised for fire purposes being one to which the plaintiff has not contributed, the city, as the owner of the water-works, should treat the fire-department as a customer, and should require to be paid from the fire-department fund into the fund raised for water supply, and for paying the water-works bonds, a fair and reasonable sum for the use of water for fire purposes.

c—It does not follow because no agreement has been made for such payment, or for the free use of water for fire purposes, that a proper adjustment of the matter has not been contemplated by the city authorities in the end, and the Court will not assume that the city will act unjustly in the premises, as it certainly would if it continued unreasonably to supply water to the fire department without charge, in which event the plaintiff would not be without a remedy.

d—The rule that where a portion of a tax is illegal, and a tax-payer has no way of separating it from the legal portion, he is not bound to pay any of the tax, cannot be applied in this case.

Error to Barry. (Hooker, J.) Argued October 10, 1890. Decided December 24, 1890.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Smith & Colgrove, for appellant.

Stuart, Knappen & Weaver, for defendant.

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CAHILL, J. The plaintiff brought this action of *assumpsit* to recover from the city of Hastings certain taxes paid to the treasurer of said city for the year 1887, under protest. In addition to the taxes paid by him individually, he claims as assignee of certain other persons similarly situated, the entire amount claimed being $127.50. The plaintiff claims the taxes were assessed and levied without authority of law, and that the taxes were illegal and void.

The case was tried before the Honorable Frank A. Hooker, circuit judge, without a jury, who made and filed the following findings of fact and conclusions of law thereon:

"1. The defendant is the city incorporated by Act No. 386 of laws of 1875.[1]

"2. Section 32 of same act authorizes the common council of said city to levy and collect taxes not to exceed ¼ of 1 per cent. on the valuation, exclusive of the expenses of the fire department, which shall not exceed ¼ of 1 per cent. in addition thereto, in any one year: *Provided*, that all parcels of land of 10 acres or more used exclusively for farming purposes, and not laid out into city lots, shall be exempted from the taxes provided by this section for the fire-department purposes.

"3. August 23, 1886, the common council adopted by yeas and nays a resolution submitting to the electors of said city a proposition to borrow the sum of $30,000 upon the bonds of said city, for the sole purpose of supplying said city and the inhabitants thereof with water:

"'*Resolved*, that the common council of the city of Hastings shall, if approved by the electors of said city of Hastings, borrow a sum of money, not to exceed thirty thousand dollars, to be used exclusively for the purpose of purchasing grounds, rights, privileges, materials, and in making improvements connected with and for the sole purpose of supplying the city of Hastings aforesaid, and the inhabitants thereof, with water; said money to be borrowed at a rate of interest not to exceed five per cent. per annum, and the same to be payable as follows, viz.: Five thousand dollars in

[1] Amendatory of Act No. 216, Laws of 1871.

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five years from date of loan; five thousand dollars in ten years from date of loan; five thousand dollars in fifteen years from date of loan; and the balance, not exceeding thirty thousand dollars in total, in twenty years from date of loan.

"'*Resolved*, that the question of borrowing said sum of money at a rate of interest not exceeding five per cent. per annum, upon the terms above specified, and for the purpose above stated, be submitted to the electors of said city of Hastings, for their ratification and approval or rejection, at a special election to be held for that purpose on Monday, the 13th day of September, A. D. 1886.'

"4. At an election held upon the day designated, the resolution was adopted by a majority of the electors of said city voting at said election voting therefor by ballot.

"5. The council subsequently issued the bonds of said city to the amount of $30,000, and borrowed money thereon, and constructed water-works for said city therewith.

"6. In constructing said water-works, a well from 20 to 30 feet in diameter was sunk for the purpose of procuring pure water for domestic purposes. Thirty-nine hydrants for fire purposes were placed at the intersection of streets, and provisions were made for the use of water for various private and public purposes. In the construction of this system of water-works 39 hydrants were placed by the contractor, under contract with the city therefor, at the intersection of streets. These hydrants are used for the sprinkling of streets, and for cleaning the gutters and streets. At the time of the trial of this cause, some of these hydrants had once been used for fire purposes, by attaching hose directly to them, the water being thrown by means of the direct pressure from the pumps at the water-works.

"7. In raising taxes for said city, and for the year of 1887, the council included an amount to cover the interest upon said bonds.

"8. A number of residents of said city owning parcels of land of more than 10 acres each, used exclusively for farming (and residence) purposes, and not laid out into city lots, were taxed for said interest, and paid the same under protest. At the time of the levying of the tax in question there had been made no contract or agreement by which the fire department paid for the use of these hydrants, or for water used by the fire department for

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fire purposes from said water-works, nor had either the common council of the city or its board of water commissioners entered into any contract or agreement to furnish water to the fire department without compensation therefor.

"9. The claims of said persons were duly assigned to the plaintiff before the commencement of this action, and amounted to the sum of $127.50. They were paid February 25, 1888.

"10. The fire department of said city makes use of and principally depends on said water-works for water used in extinguishing fires, though but one fire has occurred since said works were constructed. The fire department still has and maintains the same cisterns and reservoirs filled with water since as before the construction of the water-works, and the same equipments for fire purposes are still owned and kept on hand for use if required, or when required. The cisterns and pumping machinery of the fire department have not actually been used since the completion of the system of water-works.

"LAW.

"1. Section 32 of the charter exempts farming lands from certain taxes provided for by said section for fire-department purposes.

"2. The water-works in question are not provided for by said section or act, but were constructed under How. Stat. § 3090 *et seq.*

"3. It follows that plaintiff cannot recover, and defendant should have judgment for costs."

Judgment was duly entered on the findings, and the plaintiff brings error. The only question that is open to us is, do the findings of fact support the judgment? We are of the opinion that they do. The plaintiff and his assignors are entitled to be protected, under the provisions of section 32 of the charter, from the payment of any taxes levied for fire-department purposes in the city. This provision of the charter is a reasonable and valid one, and cannot be disregarded by the city authorities without a breach of faith, which the courts will not permit. But the weakness of the plaintiff's case lies in the fact that the tax complained of was not, so

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far as this record shows, levied for fire-department purposes. It was levied to pay the interest on a debt contracted "for the purpose of supplying said city and the inhabitants thereof with water." It is insisted that, because certain hydrants have been put in, and are used in part for fire purposes, plaintiff and his assignors are exempt from paying any part of the expense of the water supply. But that would not be just. They are as much bound to contribute towards the expense of a water supply for all except fire purposes as are any other property-owners. This the plaintiff would not deny, if the water was only to be supplied to the city for flushing sewers, sprinkling and cleaning the streets, and to the inhabitants for domestic uses. The circuit judge finds that the supply of water was obtained and used for such purposes. Shall the plaintiff escape his share of this legal tax against him, because the city chooses to furnish water for fire purposes also? That is not at all necessary for the protection of plaintiff's rights under the charter. The city is authorized to raise a tax for fire purposes, and by section 21 of the charter (2 Laws of 1871, p. 299) the treasurer of the city is required to keep the several funds raised by tax for various purposes separate, and to "pay every warrant out of the particular fund upon which it is drawn." As the fund raised for fire purposes is one to which plaintiff and those similarly situated have not contributed, the city, as the owner of the water-works, should treat the fire-department as a customer, and should require to be paid from the fire-department fund into the fund raised for water supply, and paying the debt, a fair and reasonable sum for the use of the hydrants for fire purposes. The finding of the circuit judge is that no contract or agreement had been made by which the fire department paid for the use of the hydrants or for water for fire purposes,

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or by which the water was to be furnished free. It does not follow that a proper adjustment of the matter has not been contemplated by the city authorities in the end. What would be a fair and reasonable sum for the fire department to pay cannot be told without trial and experiment. We cannot assume that the city will act unjustly in the premises, as would certainly be the case if it continued unreasonably to supply water to the fire department without charge. In such an event the plaintiff, and those situated like him, would not be without remedy. On this record, however, we cannot say that the whole, or what part, of the tax complained of, was levied for fire-department purposes. There is no basis on which the plaintiff could recover the whole tax, nor can we say from this record what part of it he is entitled to recover.

It may be said that the plaintiff is not responsible for any difficulty that may exist in separating that part of this tax which he ought to pay from that part which he is exempt from paying; that, as he has no way of separating the legal from the illegal, he was not bound to pay any of it; and this would be the rule in cases where a part of the tax was clearly illegal. But that rule cannot be applied here. It is wholly impracticable for the city to determine with certainty what part of the aggregate cost of the water-works is chargeable to the desire for fire protection, and what to the desire for water for other purposes. Every item of cost in the equipment, including the hydrants, would be necessary if the use for fire purposes was not contemplated at all. Any estimate of the share or proportion of the aggregate cost that would be properly chargeable to fire purposes must be largely a matter of conjecture. If the city had proceeded on that theory, and had divided the tax, we can see no ground for relief for the plaintiff, however much he might be

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dissatisfied with the division. The situation is peculiar, and one that needs to be considered from the standpoint of equity and fair dealing between the city and the plaintiff, and we have no doubt it will be so treated.

Errors are assigned upon the neglect and refusal of the circuit judge to find certain facts which it is claimed were proven in the case; but as no bill of exceptions was settled, and the evidence is not returned, we cannot say that the circuit judge was in error.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

THE PORTSMOUTH SAVINGS BANK v. HENRY HART, CIRCUIT JUDGE.

Practice in circuit courts—Amendment of plea—Discretion of court—Alteration of judicial circuit.

1. Only the trial judge to whom a case has been submitted for decision can properly hear and pass upon a motion to amend the plea by adding an affidavit denying the execution of written instruments sued upon, upon the ground that the question of such execution was fairly raised by the evidence, making the proposed amendment in the nature of one to cover proofs.[1]
2. A motion to amend a plea by filing an affidavit denying the execution of written instruments described in the declaration is properly heard by the circuit judge before whom the case has been tried, and who has reserved his decision, though at the time of the entry of the motion the county in which the suit was tried has been made a part of another judicial circuit.

[1] See *Insurance Co. v. Circuit Judge*, 79 Mich. 241, where it is held that a circuit judge is not disqualified from rehearing a motion or cause which has been passed upon by another judge sitting in the same court.

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8. On the trial of a suit brought on village bonds the testimony tended to show that the bonds sued upon were not the ones authorized to be issued, but another set of the same amount, and containing recitals upon their face which the plaintiff claimed induced it to purchase in the belief that the bonds were such as the village had power to issue. The village had not denied the execution of the bonds under the rule, and, after the case was submitted to the court for decision, entered a motion for leave to amend its plea by adding an affidavit denying such execution, claiming that the latter bonds were never issued by authority of the village. And it is held that the allowance of the amendment, as in the nature of one to cover proofs, was within the discretion of the trial judge.

Mandamus. Submitted October 8, 1890. Denied December 24, 1890.

Relator applied for *mandamus* to compel respondent to set aside an order granting a defendant leave to amend its plea by adding an affidavit denying the execution of certain bonds sued upon. The facts are stated in the opinion.

George P. Stone, for relator.

T. W. Whitney, for respondent.

LONG, J. This is a petition for *mandamus* to compel the Honorable Henry Hart, circuit judge, to set aside an order made in the Gratiot circuit court permitting the village of Ashley, defendant, to interpose an affidavit denying the execution of certain bonds upon which suit was brought.

The petition states, substantially, that the Portsmouth Savings Bank lately commenced a suit in the circuit court for the county of Gratiot against the village of Ashley, in said county, to recover the amount due on certain municipal bonds, alleged to have been executed and issued by the said village of Ashley.

"That the said suit was commenced by declaration, in

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which was set forth copies of the written instruments upon which recovery was sought; that the defendant appeared and pleaded the general issue to such declaration, and appended thereto a notice that it would show that the bonds mentioned in plaintiff's declaration were issued without authority; that afterwards, and on the 15th day of July, 1889, said cause came on for trial before said court without a jury, Judge Henry Hart then being presiding judge of the 21st judicial district, and Gratiot county then being included within said 21st judicial district; that said cause was fully tried on its merits by the parties, and the said court took the same under consideration.

"By Act 174 of the Public Acts of 1889, Gratiot county was detached from the 21st judicial district. This act went into effect on June 21, 1889, and Hon. S. B. Daboll was afterwards, and on August 1, 1889, appointed judge of the 29th judicial district. On the 13th day of September, 1889, the defendant made and entered a motion in the Gratiot county circuit court in said cause, moving the court to be allowed to amend its plea by interposing an affidavit denying under oath the execution of the bonds upon which suit was brought. This motion was brought on for hearing before the Hon. S. B. Daboll, circuit judge for Gratiot county, on the 17th day of September, 1889, and said motion was granted, and an order made in said cause permitting the defendant to so amend its plea.

"That afterwards, and on the 13th day of November, 1889, this Court, upon a motion for a *mandamus*, wherein your petitioner was relator, and S. B. Daboll, circuit judge of Gratiot county, was respondent, granted said writ of *mandamus* setting aside said order so made as aforesaid. And your petitioner shows that, on said motion so made in this Court, your petitioner exhibited and filed in this Court a bill of exceptions in said cause, which bill embodies the pleadings, testimony taken on the trial, and the journal entries in said cause, together with a copy of the defendant's motion, and the affidavits upon which the same was based; all of which are now on file in this Court in the matter of the application for *mandamus* hereinbefore mentioned, and to which your petitioner prays leave to refer on this motion.

"And your petitioner further shows that afterwards, on the 24th day of January, 1890, the said defendant,

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the village of Ashley, again made and entered a motion in the circuit court for the county of Gratiot, to be allowed to interpose an affidavit denying the execution of the said bonds mentioned in plaintiff's declaration, which motion was precisely the same in form and substance as the one it had previously made and entered in said cause; that said motion was based upon affidavits which were copies of the affidavits upon which the former motion was based; that said motion was precisely the same in every respect as the previous motion, and a copy thereof, with the exception of dates; and that the notice attached thereto gave notice that the motion would be brought on for hearing in the circuit court for Gratiot county, before the Hon. Henry Hart (a copy of which motion, affidavit, and notice is herewith annexed); that afterwards, and on the 21st day of March, 1890, said motion came on for hearing in the Gratiot county circuit court, before Hon. Henry Hart, sitting as judge thereof, who thereupon made an order granting the defendant's motion, and permitting the defendant to amend its plea in accordance therewith (a copy of which order is herewith annexed); that said cause has been during all the time since its submission to him, and now is, pending and undetermined before Hon. Henry Hart, judge of the 21st judicial circuit; that on the said 21st day of March, 1890, said cause was in the same condition and situation as it was at the time the order was made therein which was set aside by this Court, and that in the interval between the making by the defendant of the first motion, and the making of the second, and obtaining the order complained of herein, no steps whatever were taken in said cause by either party."

On filing the petition in this Court, an order was entered requiring the circuit judge to show cause why said order should not be set aside.

The circuit judge in his answer says:

"1. He admits the statements in relator's petition to be true in substance and fact.

"2. He says that the question of the execution of the several instruments sued on in said cause was fairly brought into question by the proofs in said cause, and therefore the amendment asked by defendant was in the nature of one to cover proofs.

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"3. Respondent avers that he carefully protected all rights of plaintiff in his order allowing defendant to amend his plea, and that said order is clearly within the discretion allowed the judge at circuit."

The affidavit permitted to be filed was made by Thompson Kirby, one of the trustees of the village, and at the request of the village authorities. The affidavit is as follows, after entitling in the court and cause:

"Thompson Kirby, being duly sworn, deposes and says that he has been a member of the board of trustees of the village of Ashley from the organization of said village, in 1886, until December 1, 1889, and that he makes this affidavit for and on behalf of said village of Ashley, the above-named defendant, and at its request and in accordance with the annexed resolution.

"Deponent says that the several bonds, coupons, and obligations numbered consecutively from one to seventeen, in said plaintiff's declaration mentioned, were never executed or delivered by the above-named corporation defendant; that said instruments were never sealed by the defendant, or by any person duly authorized; that said instruments were never delivered by this defendant to the plaintiff, or to any other person or persons whomsoever; that the above-named defendant never authorized any person or persons to deliver the written instruments for it to any person or persons; that the corporate seal of said corporation defendant, if affixed to said instruments, known and denominated 'bonds,' was affixed without authority from the defendant; that the same was unauthorized by it; that said bonds and obligations made and mentioned in plaintiff's declaration were never transferred by the defendant to any person or persons, nor were said bonds ever negotiated or sold for the benefit of the said village.

"THOMPSON KIRBY.

"Sworn and subscribed before me this 16th day of January, 1890.

"GEORGE W. MEAD,
"Justice of the Peace, Gratiot county, Mich."

The argument of the relator's counsel is that the testimony taken on the trial, which was filed in this Court on the previous motion by relator, and which relator

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refers to in this petition, shows that all the testimony introduced by defendant on the trial, tending to question the execution of the instruments in suit, was introduced against the objection of plaintiff, and the grounds of such objection were plainly and fairly stated to be that defendant had, by its plea, admitted the due execution of the written instruments mentioned in plaintiff's declaration, yet defendant interposed no motion to amend its plea, and the court received the testimony, and plaintiff took its exceptions thereto; and that this cannot be regarded as a motion to amend on the trial; that the cause was tried and submitted on July 15, 1889, and no motion was made to amend until September 13 following; that the order made by Judge Daboll was vacated by this Court November 13, 1889, and the defendant interposed its motion, upon which the present order was made, January 24, 1890. It is claimed further by relator's counsel that the effect of the order in question is not only to allow the defendant to amend its plea, but to grant a new trial in the cause, which, if granted, must be in the twenty-ninth judicial circuit, that being the circuit in which the county of Gratiot is now situate. It is also contended that every material question involved in this cause has been once litigated in this Court, and is *stare decisis*.

It is provided by How. Stat. § 7631, that—

"The court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."

This statute has always been liberally construed. *Beecher v. Circuit Judges*, 70 Mich. 363. It is well settled that, where the discretion which this statute places in the trial courts to allow amendments in the furtherance

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of justice is not abused, this Court will not review the power thus exercised. *Tupper v. Kilduff*, 26 Mich. 394; *Polhemus v. Bank*, 27 Id. 44; *Beecher v. Circuit Judges*, *supra*.

The cause having been tried before the Honorable Henry Hart, sitting as the trial court in that cause, the motion for such amendment was properly made before him, though, at the time of the entry of the motion, the limits of the judicial circuit had been changed, and Gratiot county placed in another circuit. He was the trial judge on that cause, and the cause was still pending before him at the time of the entry of the motion. Properly, the motion could not be heard before one of the circuit judges who had taken no part in the trial, and could have no knowledge of the matters then in controversy between the parties, or what the justice of the case required in granting or denying the motion. In the former motion, it appeared that Judge Daboll had granted an order under circumstances which did not warrant its entry, he not having heard the cause, and having no knowledge of the merits of the controversy. The cause had been tried, and was awaiting a decision from the Honorable Henry Hart, the judge before whom the trial was heard. It is true that the former motion involved some of the same questions now presented, but under the circumstances it cannot be regarded as *stare decisis*.

We cannot say that the circuit judge abused the discretion which the statute vests in him in granting this motion. The testimony taken on the trial and filed in this Court on the former motion, and to which relator refers in its petition, tends to show that the bonds in question were not the bonds prepared by the village, and by resolution of the board of trustees directed to be signed by the president and clerk, but another set for

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the same amount, containing recitals upon their face which plaintiff claims induced it to purchase in the belief that the bonds were such as the village had power to issue. The defendant claimed that these second bonds were never issued by authority of the village, and filed the affidavit of Mr. Kirby denying their execution. We think the order alowing the affidavit to be filed was within the discretion of the trial court, under the provisions of the statute above cited, and we cannot disturb the order.

The *mandamus* will be denied, with costs.

The other Justices concurred.

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JOSEPH F. RICHARDSON ET AL. v. CHARLES W. RICHARDSON, JR., ET AL.

Accounting—Fraud—Bill in equity—Parties—Attorney and client.

In this case it is held that the personal representatives of a deceased trustee, who received the fund in which complainants were interested, and of which they claim to have been defrauded, are necessary parties, and the case is remanded, with leave to complainants to join such representatives as defendants, and, after issue is joined, further proofs to be taken, those already taken to stand as proofs in the cause.

Appeal from Wayne. (Reilly, J.) Argued October 9, 1890. Decided December 24, 1890.

Bill for an accounting. Complainants, and defendants Richardson and George William Moore, appeal. Reversed, and cause remanded. The facts are stated in the opinion.

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James H. Pound (*Turnbull & Dafoe*, of counsel), for complainants.

J. C. Shields, for defendant Richardson.

Edwin Conely (*Ashley Pond*, of counsel), for defendant George William Moore.

George Whitney Moore, defendant, *in pro. per.*

MORSE, J. Charles W. Richardson, of Alpena, in this State, died in that city on June 18, 1886, leaving property estimated at $1,000,000 in value. He left surviving him a widow, Diana Richardson, Arthur R., Allen, and George Richardson, brothers of the full blood, Melvina Leavitt, Frederick L., Frank, and Maude Richardson, children of Alfred Richardson, a deceased brother of full blood, Caroline Gage, and an heir of Clarinda Delano, sisters of full blood, and Eben, Joseph F., and Albert Richardson, half-brothers, and Miranda E. Emerson and Sylvia Prince, half-sisters, and Melvin, Alta, and George Prince, children of his half-sister, deceased, Mary J. Prince.

He left a will executed in Canada some 30 years before his death, in which he bequeathed all his estate to his wife, Diana. Soon after his death, it was determined by his brothers and sisters to contest this will, and for that purpose the brother George Richardson obtained a power of attorney from all the heirs, except the heir of the sister Clarinda Delano, whose whereabouts was not known, authorizing him to act as he might think best, with the understanding that each should contribute his or her share of expenses, and share equally in the division of the property secured, if any. The will was admitted to probate without any serious contest, and George Richardson set about perfecting papers for an appeal from the probate court to the circuit court of Alpena county.

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He employed Moore & Moore, of Detroit, the defendants George William and George Whitney Moore, after the probate of said will, to attend to and manage the further proceedings.

On August 30, 1886, a settlement was effected by which the widow paid $120,000 to compromise the matter, and have the contest withdrawn. This settlement was closed at her house by George William Moore, acting for George Richardson and the other heirs; Judge R. J. Kelley of Alpena, being present, and acting as her attorney. Mrs. Richardson gave her check for about $9,000, and various notes of hers, payable to the order of George Richardson, amounting in all to $110,000; there being deducted from the $120,000 about $1,000 claimed to be owing from some of the heirs to her husband, and which claim George Richardson allowed. This check and the notes were turned over by George William Moore that night to George Richardson, except $15,000 or $20,000,—Moore says $15,000, and Kelley $20,000,—which were left in Mr. Kelley's hands as security until the Delano heir or heirs could be found, and a release secured. The next morning George Richardson gave to George William Moore three of these notes, each for $10,000, in payment of the services of Moore & Moore, the arrangement being that they should receive 25 per cent. of the amount realized from the contest of the will by the heirs. George Richardson at this time was sick in bed from an illness of which he never recovered; dying, October 14, 1886.

At the time this settlement was effected, Moore gave to Mrs. Richardson an assignment of all of George Richardson's interest in his brother's estate signed by said Richardson, and also an assignment of all the interest in the same estate of Arthur Richardson, Allen Richardson, Caroline Gage, Sylvia E. Prince, Albert Richardson, Miranda Emerson, Joseph Richardson, Melvin Prince,

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Eben Richardson, Melvina Leavitt, Frederick L. Richardson, and Elizabeth E. Bailey, signed with their names "by George Richardson, their attorney in fact."

This bill is filed by the half brothers and sisters, and the children of the deceased half-sister, to recover their portion of the estate, out of which they allege they have been defrauded. The charge of fraud in the bill, in substance, is that the defendant Charles W. Richardson, Jr., acted in all things as the agent of George Richardson, his father, and was cognizant of all the doings of the latter in the premises; that, before the settlement, he, in anticipation of such settlement, fraudulently purchased half of the interest of Joseph and Albert Richardson in the estate, paying said Joseph $125, and to Albert, property of the value of not to exceed $250; that the fraud consisted in falsely representing to them that there was no chance of succeeding in the contest of the will; that, immediately after the settlement and payment of the $120,000 by Mrs. Richardson to George Richardson, the said George and said Charles W. Richardson, Jr., by their agent and the said George William Moore, came to each of the complainants residing in Alpena, to wit, Joseph F. and Albert Richardson, Miranda E. Emerson, Sylvia and Melvin Prince, and Levi Prince, father of said minors, George and Alta Prince, and falsely and fraudulently represented that Mrs. Diana Richardson had made a proposition to pay each of said half-blood brothers and sisters the sum of $1,500, and that was all she would pay them, and that they must take that or nothing, and that they must decide within one hour, and further represented that Charles W., Jr., was willing to settle for his half, that he had bought of Albert and Joseph, at $750 for each half; that Levi Prince, within said hour, went to said George Richardson and said Moore, and asked them both what was best to do about

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accepting said offer, and received evasive replies from both of them, they saying "it was hard to tell," but both of them gave the said Prince to understand that the heirs had better accept the offer, and, relying upon the false and fraudulent statements aforesaid, and the fraudulent conduct of said George and Charles W. Richardson, Jr., and said Moore, they agreed to settle on said basis, and received from the said agent of George and Charles W. Richardson, Jr., and said George William Moore the following sums respectively: Sylvia Prince and Miranda E. Emerson, $1,500 each; Joseph F. and Albert Richardson, $750 each; Melvin Prince, $500; and Levi Prince, for said minors, George and Alta, $1,000,— all of them (said Levi Prince signing for said minors) giving a release of all their right, title, and interest in and to the estate of said Charles W. Richardson, deceased; that on September 3, 1886, said Moore went to the house of Eben Richardson, at Worcester, Mass., and showed him the releases signed by all the others, and made, in substance, the same representations to said Eben that he and said agent had made to all of the other complainants, and thereby induced said Eben to take $1,500 and release his interest; that none of them knew or were informed of the settlement, and, if they had known of it, they would not, any of them, have accepted of said sums or given the releases.

That Moore & Moore and said George and Charles W. Richardson, Jr., received $120,000 for said contesting heirs, to be divided equally; that there has been paid to the complainants not to exceed $8,000, and to the full-blood heirs, outside of George, not to exceed $37,500; that the balance remains in the possession and control of said first-named parties, of which $52,000 belongs to complainants; that Moore & Moore and the two said Richardsons entered

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into a conspiracy to wrong and cheat complainants, and, in pursuance of the same, made the settlement with Diana, and received said amount into their possession, and then falsely concealed said settlement from complainants, and fraudulently represented to them that said Diana would only pay said half-blood brothers and sisters $1,500 each, and, if they did not accept, they would get nothing, and influenced them to accept such sum, when they were entitled to at least $7,500 each, and to sign releases, by which false representations, deceptions, and conduct they were defrauded out of $52,000, which said sum the said Richardsons and Moore & Moore have converted to their own use; that Moore & Moore are not entitled to any compensation by reason of their fraudulent conduct, and are liable to complainants for the full amount out of which they have been cheated; that Moore & Moore and Charles W. Richardson, Jr., have in their possession $60,000 belonging to complainants, which in equity they should pay over to complainants, and account to each for their portion due to them thereof; that George Richardson died, October 14, 1886, and that his estate has been settled up in the probate court of Alpena county.

The prayer is for an accounting and for general relief. The bill was filed in the circuit court for the county of Alpena, in chancery, January 11, 1887, and afterwards transferred to the Wayne circuit.

The defendant Charles W. Richardson, Jr., answered, denying any fraud in the purchase of the half interest in the shares of Albert and Joseph; denies that he acted as the agent of his father either in the contest of the will or the settlement; denies that he knew of such settlement until some time after it was made; avers that he knew nothing of the representations to the half-blood heirs to

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induce them to release their interest; and denies any lot or part in the transaction, or any knowledge of the same, until after it was all done; denies any conspiracy upon his part, or any knowledge of any fraud upon the part of his father or Moore & Moore; denies that he has ever received, or has in his possession, any money coming from said settlement belonging to complainants, or any of them; prays benefit of demurrer in his answer on ground of want of equity in the bill.

George Whitney Moore denies any knowledge of, or any participation on his part in, any fraud upon the complainants.

George William Moore denies that he had any part in determining what the complainants should receive, or in any fraudulent representations or conduct inducing them to accept the said sum of $1,500 for each of their interests. Denies that Moore & Moore received any sum for or on behalf of the half-blood heirs, or have ever had in their hands any money belonging to them. He then sets out the circumstances of his employment, his participation in the settlement with Diana Richardson, his passing of the whole amount received from her over to George Richardson, and his payment and discharge by said George. Denies any conspiracy to defraud complainants; that he concealed said settlement from them; or that he fraudulently represented that Diana Richardson would only pay the half-blood heirs $1,500 each. Denies that he represented they would get nothing if they did not take that sum, or that he influenced any of them to take that amount. Denies that he individually, or jointly with any other person, cheated or defrauded complainants, or any of them, out of any sum of money whatever, or converted any money belonging to them to his own use. Claims that the bill is multifarious in that it alleges several distinct claims against one of the defendants, in

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which it appears that he, the defendant George William Moore, has no interest, and in which only a portion of said complainants have any interest.

A singular thing about these pleadings is that although the testimony shows that Robert J. Kelley, the attorney of Diana Richardson, was the central figure in the transaction by which the releases of the complainants were obtained, his name is not found in the bill or any of the answers; but the "said agent" mentioned in the bill undoubtedly refers to him, as will be seen when the proofs are examined.

The circuit judge, Hon. C. J. Reilly, made a decree finding the fraud as alleged in the bill except as against George Whitney Moore, and ordered and adjudged that the defendants George William Moore and Charles W. Richardson, Jr., pay to said complainants the sum of $37,175, with interest from September 1, 1886, to April 1, 1890, amounting in all to $45,167.66. The bill was dismissed as against George Whitney Moore, with costs.

The defendants Richardson and George William Moore appeal, and the complainants appeal from that portion of the decree dismissing the bill as against George Whitney Moore.

We have examined the proofs, and find that a great fraud has been committed upon these complainants, by which they have been deprived of their rightful share of the money and notes received by George Richardson upon the settlement with Diana. We find, however, no fraud in the purchase of the half of the shares of Albert and Joseph Richardson by Charles W. Richardson, Jr. But it appears to us from all the facts in the case that the complainants should pursue the fund, and reach the same, if possible, received by George Richardson, and which he held, in trust for complainants, and that his representatives are necessary parties to the bill, and that all the

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parties engaged in the alleged fraudulent design to cheat them out of such notes and money should be made parties.

The decree of the circuit court, in chancery, for the county of Wayne, will be reversed, and the cause remanded to that court, with leave to complainants to add the parties referred to above, and, after said amended bill shall be at issue, further proofs may be taken by either party, the proofs already taken to stand as proofs in said cause. The defendants will recover costs of this Court.

The other Justices concurred.

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CHARLES M. WELCH v. THE TRIBUNE PUBLISHING COMPANY.

Libel and slander—Evidence—Malice—Jury—Untrue verdict—Attaint.

1. To charge that a jury have perjured themselves in rendering a certain verdict is libelous.
2. In a libel suit brought by a juror against the proprietor of a newspaper for charging that the jury in a certain case, of which the plaintiff was a member, perjured themselves in rendering their verdict, the plaintiff cannot be questioned concerning the verdict, or his motives or reasons for finding the same; such mode of questioning falling within the prohibition of How. Stat. § 7608, abolishing the common-law remedy of attaint upon untrue verdicts.
3. The trial judge cannot upon his own motion reject a qualified juror with whom the parties are satisfied, unless for sufficient cause, which should appear upon the record.
4. On the trial of a libel suit brought by a juror against a newspaper proprietor for charging that a jury of which plaintiff was a member perjured themselves in rendering their verdict, and in which the defendant gave notice of justification, the plaintiff was asked on his direct examination if any influence

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other than that of the evidence and instructions of the court and arguments of counsel was brought to bear upon him in the consideration and finding of his verdict, which question is held to call for immaterial testimony, no such fact being in issue.

5. Plaintiff's counsel offered in evidence a paper signed by the plaintiff and the other members of the jury, requesting the defendant to retract the alleged libelous charge, which was admitted, but its reading to the jury made subject to proof that it reached the defendant, which ruling is sustained.

6. The plaintiff was allowed to be asked on cross-examination if there were not publications in all of the newspapers in the city where the verdict was rendered in which it was severely criticised, which is held not to have been an abuse of the discretion of the trial court, the alleged libelous article having characterized the verdict as extraordinary, and the testimony tending to show that it was so regarded by the public.

7. Evidence of the publication by a defendant in a libel suit, after its commencement, of an article in which the alleged libelous article was republished, with comments thereon, is admissible as showing malice on the part of the defendant.

Error to Wayne. (Brevoort, J.) Argued October 9, 1890. Decided December 24, 1890.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

W. H. H. Russell, for appellant, contended:

1. What appeared in other papers had nothing to do with the responsibility of defendant for the publication of articles complained of in this case, and the objections of plaintiff's counsel to the questions asked of plaintiff on cross-examination touching such publication in other papers should have been sustained; citing *Maclean v. Scripps*, 52 Mich. 214.

2. A newspaper article which pronounces the verdict of a jury to be *infamous* is libelous *per se;* citing *Byers v. Martin*, 2 Colo. 605 (25 Am. Rep. 755); *In re Cheeseman*, 49 N. J. Law, 115 (60 Am. Rep. 596).

3. Under How. Stat. § 7608, the author and publisher of any article which has a tendency to degrade the judicial tribunals, destroy that public confidence and respect for their judgments, proceedings, and decrees so essential to the good order and

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well-being of society, and thus most effectually obstruct the free course of justice, may be punished for contempt; citing *In re Moore*, 63 N. C. 397; *State v. Morrill*, 16 Ark. 384; *Watson v. Williams*, 36 Miss. 341; and if courts have this power, surely a juror, as a part of the court, should have redress for libelous assaults on his character as such; citing *Ex parte Robinson*, 19 Wall. 505.

John Atkinson, for defendant, contended:

1. It is only when excusing the juror affects in some way the right of challenge that any objection can be made. In this case not a single challenge was presented, and an unexceptional jury was obtained, and the discretionary power of the circuit judge was in no way abused; citing *Pannell v. State*, 29 Ga. 681; *State v. Ostrander*, 18 Iowa, 435; *State v. Whitman*, 14 Rich. Law, 113; *Hines v. State*, 8 Humph. 597.

CHAMPLIN, C. J. The plaintiff brought an action of trespass on the case against defendant for libel.

In June, 1889, the plaintiff was summoned to appear in the recorder's court of the city of Detroit, as a talesman to serve as a juror in the trial of Nelson Brule, then about to be tried upon an information charging him with assaulting, with intent to kill and murder, Ida Corneau. He was examined as to his qualifications, and admitted and sworn as a juror in the cause. After hearing the testimony, the arguments of counsel, and the charge of the court, the jury retired to consider the case, and, after being absent a short time, they returned into court, and reported that they found Brule was not guilty.

The next day the Detroit Tribune, published by the defendant, contained an editorial, reciting the circumstances of the alleged attempted killing, and animadverting severely upon the jury for having returned such a verdict, which it characterized as outrageous. The libelous words charged in the declaration read as follows:

"Every little while the popular faith in our boasted system of trial by jury gets a tremendous wrench by the rendition of a specially outrageous and idiotic verdict on

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the part of twelve prize jackasses who get into the jury-box. Such an event happened in Detroit yesterday."

The article then went on to state as follows:

"Some time ago one Nelson Brule, a young married man with a family, concealing that fact, proceeded to 'make love' to a young lady of good family and character, and so far enlisted her affections as to secure her tacit consent to a proposal of marriage. While she was delaying, in order to become assured that her suitor's parents would take kindly to her,—a very natural hesitation on a prudent young lady's part,—she learned the true condition of Brule's domestic affairs, and then refused to have anything further to do with him. A few days after she had made this announcement to him, he called on her again, saying that he was going home, and asking her to see him off on the train, and bid him good-by. This impudent proposition she declined, but weakly consented to walk down the street with him. While doing this he suddenly seized her around the neck, placed a pistol to her head, and fired. She screamed, staggered, and fell, and, supposing he had accomplished his murderous intent, he put another ball into his own head,—unfortunately where it didn't do the most good. Both persons recovered, and the would-be murderer has been on trial in the recorder's court for the last three days on a charge of assault with intent to murder; the following citizens of Detroit composing the jury: Thomas Hurst, M. P. Christian, Henry M. Bailey, H. A. Marks, Thomas Griffin, Joseph Atkinson, James Keligher, Charles M. Welch, G. B. Noble, Charles F. Ferris, Morgan Lacey, Samuel Furguson.

"We have narrated in brief the plain facts of the case, about which there is not the slightest controversy. The defense set up was emotional insanity. Here was a man attempting for months to persuade a young girl to marry him, which, had he succeeded, would have involved the crime of bigamy on his part. If that was not his real intention, only one other object is supposable in his case,—that of the crime of his victim's seduction. Either purpose brands him a deliberate villain. There was nothing emotional about this intelligent hunting of an innocent girl. But, when foiled in his dastardly and devilish efforts, he seeks to murder the object of his long pursuit, 12 men are found to acquit him on the ground that he

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was insane just at the moment of committing the act. By this verdict he is turned loose in the community to repeat his venture, if he chooses, if he can go where his identity and history will not be known.

"No wonder that a general outburst of indignation has followed the rendition of such an outrageous verdict. Every young woman's life in Detroit is rendered less secure by the result of this trial. Every villain is encouraged to believe his chances of escape bettered if he plots against the happiness, the virtue, and the life of an innocent girl. If there seems to be anything out of the way in these few feeble remarks, charge it up to emotional insanity."

A few days after, another article appeared in the paper under the heading, "This is Encouraging," and, commenting on and commending a coroner's jury, who found that the deceased "came to his death through an assault made upon his person by John Cook," added:

"The infamous Brule jury, and the scarcely less censurable coroner's jury in the Crawford case, are quite enough of that kind of verdict-makers. An outraged and indignant public wants no more of that sort. The toughs and crooks of Detroit have hitherto had altogether too much liberty, and too many friends in court."

Later another article appeared, which purported to report the proceedings of a religious meeting at the Casino Tabernacle, in which a speaker said:

"You are all under sentence of death. There is no jury which is going to perjure themselves and let you off, as one did in this city a few weeks ago."

These articles were all counted upon as libelous in plaintiff's declaration. The defendant pleaded the general issue, and gave notice that it would insist upon the truth of the articles published as a defense to the action. The trial resulted in a verdict for defendant.

The first assignment of error relates to the action of the court in excusing the juror Joseph G. Campau, who was called and examined by counsel of both parties, who

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announced themselves as satisfied with him as a juror. The court, without a challenge being interposed, and without stating any cause or reason therefor, excused the juror, against the protest of the plaintiff. We do not think the judge has a right to reject a qualified juror with whom the parties are satisfied, unless for sufficient cause; and such cause should appear upon the record. *Pearse v. Rogers*, 2 Fost. & F. 137. The circuit judge is not invested with any right of peremptory challenge. He can excuse for cause, but the cause must be stated, so that it may appear of record. Proff. Jury, § 140. The exercise of the power to discharge a juror by the circuit judge of his own volition is not a matter of discretion. It must be based upon some cause. It will not do to hold that a circuit judge may, without assigning any reason, discharge jurors at his mere will or caprice. If he may so discharge one juror he may discharge a dozen, and compel parties, after they have exhausted their peremptory challenges, to accept such a jury as he is satisfied with. Counsel for defendant contends that the record does not show that plaintiff was prejudiced, and that the presumption is in favor of judicial action. The record does disclose that the juror was one of the regular panel, and it further discloses that talesmen were resorted to in order to fill the panel which tried the cause. The law has provided measures for the selection and return of jurors to serve in the trial of causes, and a party has a right, if there be no legal objection to the jurors so returned, to have his cause tried by jurors so selected, unless rejected in a manner provided by law.

Upon the trial of the cause, the plaintiff took the witness stand, and testified in his own behalf. He stated that he heard all the evidence in the case, the arguments of counsel, and the instructions of the court, after which the jury retired to the jury-room to consider the evidence,

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and agree upon a verdict; that they were out something over an hour, and returned into court with a verdict of "not guilty." He was then asked by his counsel:

"Was there any other influence than that of the evidence and the instruction of the court and the arguments of counsel brought to bear upon you as a juror, in the consideration and conclusion of your verdict?"

This was objected to as immaterial, and excluded. Error is assigned upon the ruling. The ruling was correct. No such fact was in issue.

A request in writing, signed by all the jurors, asking the Tribune to make a retraction, was then shown to the witness, and he testified that he signed it, and requested it to be presented to the Tribune people for retraction of the article. Counsel for defendant objected to it being received in evidence. The court decided to admit it, but that it should not be read unless it was shown to have reached the defendant. This ruling is excepted to, and alleged as error. Plainly it was not error. Moreover, the parties had stipulated in writing the fact that a request in writing was made upon the defendant to retract the alleged libelous articles, and that no retraction had been made. No attempt was made to identify this as the request which was presented.

Witness was permitted to be asked, against plaintiff's objection, if there were publications in all of the newspapers in Detroit in regard to the verdict rendered in the Brule case, and that if in all of them the action of the jury was severely criticised; and error is assigned upon the rulings. We think the latitude permitted upon the cross-examination by the court was not an abuse of discretion. The verdict was characterized as extraordinary, and the testimony tended to show that the public regarded it as such.

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He was asked upon cross-examination the following question:

"Mr. Welch, you say that, after hearing the evidence and the charge of the court in that case, the jury retired to consider their verdict. Now, was the verdict that was rendered in that case the verdict you agreed upon in your jury-room?"

The question was objected to by counsel for plaintiff as incompetent and immaterial, and—

"Because the stipulation shows what the verdict was, and because section 7608, How. Stat., especially provides that 'no juror shall be questioned for any verdict rendered by him, nor shall he be subject to any action, civil or criminal, on account of such verdict, except by indictment for corrupt conduct in rendering such verdict in cases prescribed by law.' And further because no such matter is alleged in the defendant's plea of justification."

The objection was overruled, and the witness answered, "Yes, sir." He was further interrogated, and was permitted to testify, against the same objection, that he rendered the verdict because he thought it was right, under the evidence produced there, and the charge of the court; that he acquitted Brule on the ground of insanity, and in regard to shooting himself; that he did not think Brule shot at her at all; that he fired a pistol close to her head, according to the evidence. These rulings are assigned as error, and the counsel for the plaintiff contends that all such testimony elicited by interrogatories to this witness, who was a juror, is incompetent and privileged by the statute above quoted. The authorities cited by counsel in support of his position all relate to the incompetency of the oaths of jurors as to what took place in the jury-room while considering their verdict, tending to impeach the same. Such authorities are

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not based upon the section cited.[1] This provision of the statute grew out of the abolition of the common-law remedy of attaint, and the supplanting of that harsh procedure by the granting of new trials in civil cases; and to understand what is meant by the expression, "no juror shall be questioned for any verdict rendered by him," it is proper to refer briefly to the proceeding by attaint, which was abolished when this statute was enacted.

In the early method of trial by jury in England, from whose growth our present system has developed, the jury were composed of witnesses to the transaction submitted to them, and could rarely give a wrong verdict without at the same time committing perjury. New trials before another jury to correct a wrong verdict had not yet become the practice of the courts, and the only way of correcting such evils was by attaint. The party who alleged a wrong verdict was entitled to the process of attaint, by which he obtained a writ summoning the 12 jurors who rendered the verdict, and 24 other jurors, called the "grand jury," who should consider the matters submitted to the first 12 or petit jury. The record and proceedings of the former trial were read to them; the trial judge explained the matters in dispute upon which it was alleged a wrong verdict had been rendered, and the individual jurors who had joined in the verdict were questioned concerning the grounds of their decision; and, if the grand jury found a different verdict than the former jury, they were attained, and were immediately arrested and imprisoned, their lands and chattels were forfeited to the king, and they became unworthy of credit, and incompetent to give testimony or to sit upon

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Pierce v. Pierce, 38 Mich. 416; *People v. Knapp*, 42 Id. 271; *Hewett v. Chapman*, 49 Id. 4; *Churchill v. Circuit Judge*, 56 Id. 538.

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a jury; their wives and children should be turned out of their houses, which were to be demolished, and their trees and meadows destroyed; and this continued to be the punishment until 23 Hen. VIII, c. 3, which substituted pecuniary penalties upon the jurors. It is said in Bac. Abr. tit. "Juries" (M), that attaint "is only disused, and not taken away." It was, however, abolished in England by Statute 6 Geo. IV. c. 50 (1825). It will be seen that it came to us as a part of the common law, but was abolished by the Revised Statutes of 1838 in the following language:

"Attaints upon untrue verdicts are abolished, and, for any verdict rendered by him, no juror shall be questioned, or be subject to any action or proceeding, civil or criminal, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law." Rev. Stat. 1838, pt. 3, tit. 1, c. 5, § 34.

This was followed by the Revision of 1846, which reads the same as How. Stat. § 7608. Viewed in the light of the common law and the remedy interposed by statute, it is quite plain what the meaning and construction of the statute is. Attaints for untrue verdicts are abolished. It then proceeds to forbid what had before been the practice at common law,—the questioning of any juror for any verdict rendered by him. The questioning referred to was part of the proceeding against the juror for a false verdict. The whole section is a prohibition against any prosecution of a juror for a false verdict at the suit of a party, or by the people, except for corrupt conduct in rendering the verdict. The object of the statute is to place jurors beyond the reach of a powerful or malicious adversary, and protect them in the honest and fair discharge of their duty without fear or favor.

It would be small protection if any defeated party in a lawsuit could, through the public press, or otherwise, libel and traduce a juror, and say to him:

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"You must submit to the ruination of your character, or, if you seek legal redress, twelve other men will sit in judgment upon your motives and conduct in rendering the verdict you did."

What was done in this case was to question the juror for the verdict rendered by him as an untrue verdict, and he was called upon to give the reasons and grounds of it; and the correctness of the verdict, and the sufficiency of the testimony to produce conviction in the mind of Welch and his fellow-jurors, was again tried before another jury as fully, to all intents and purposes, as if the proceedings by attaint had not been abolished. It can make no difference that the alleged libel is justified by plea. Justification is a good defense, but it must be proved by legal and competent evidence. The shield which the statute throws around jurors from being questioned and from suit for any verdict rendered by them cannot be broken or thrown aside for the purpose of trying the truth of the verdict rendered. The statute seeks to protect the rights of the public and of parties by proceeding against a juror who has been guilty of corrupt conduct in rendering a verdict by criminal prosecution.

The conduct of jurors is not above criticism either by the public press or private parties. No political, judicial, or administrative department of the government is beyond criticism. But just criticism is not libelous, neither is severe criticism. But to charge that a jury have perjured themselves in rendering a certain verdict is libelous. It may appear in a criminal case, to a person not acting under the responsibility of an oath, from the facts and circumstances developed at the trial, that the accused is guilty, and ought to be convicted. Yet to the juror sitting upon the trial, every fact and circumstance must be consistent not only with the guilt of the accused of the crime charged, but the evidence must be of such

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character and weight as to leave no reasonable doubt of his guilt in the mind of the jury. How are such questions to be tried in a libel suit charging perjury under a plea of justification and truth of the charge? What nicely poised scales do the second jury possess which shall enable them to enter the domain of conscientious conviction or reasonable doubt in the minds of the first jury, and weigh them to ascertain whether they have violated their oaths?

What has been said has application solely to the question under consideration; that is, to the right of defendant in a case like this to question a juror concerning a verdict rendered by him, or to inquire of him his motives or reasons for finding such verdict. This is sufficient for the present case. We think the question, and those succeeding it in the same direction, should have been excluded.

We think the court erred in excluding an article appearing in defendant's paper, after suit was commenced, in which the article charged as libelous was republished and comments made. It was offered to show that the defendant entertained malice against plaintiff, and was admissible for that purpose.

For the errors pointed out, the case must be reversed, and a new trial granted.

The other Justices concurred.

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INDEX.

Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross-references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ACCEPTANCE BY ASSIGNEES—See ASSIGNMENT FOR BENEFIT OF CREDITORS (4).

ACCEPTANCE OF TENANCY—See DAMAGES (1).

ACTION—See BILLS AND NOTES (2, 3); CORPORATIONS (3c); PARTIES (3); PLEADING (5).

AFFIDAVIT.

An affidavit for a civil warrant which sets forth that the defendant represented to the plaintiff that he was superintendent for a railroad contractor, and authorized to hire men and teams, and that he would pay $3.50 per day for the services of plaintiff and his team, and furnish transportation to the place where the work was to be done, where he would be furnished accommodations at $1 per day, and that in reliance upon such representations, which were averred to be false, plaintiff agreed to go to work at the price stated, and on arriving at the place designated was informed by a person claiming to be the contractor that defendant had no authority to hire men or teams, and that plaintiff would only be paid $2.25 per day, for which sum he worked for a time and then returned to his home, while not as

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AFFIDAVIT—Continued.
clearly framed as is desirable, is sufficient to give the court jurisdiction. 547.
See APPEAL (1); EVIDENCE (18); FORCIBLE ENTRY AND DETAINER (2); PRACTICE IN CIRCUIT COURT (2-4).

AGENCY—See CONTRACT (3).

AGENT—See PRINCIPAL AND AGENT (3).

AMENDMENT—See MORTGAGE (1); PLEADING (3, 4); PRACTICE IN CIRCUIT COURT (2-4).

ANTECEDENT DEBT—See PURCHASE FOR VALUE.

ANTENUPTIAL AGREEMENT—See SPECIFIC PERFORMANCE (4).

APPEAL.

1. An affidavit for an appeal from a judgment against two joint defendants was made by one of them in behalf of both, who executed the required bond, with one surety, but it was not executed by his co-defendant, nor did he appear in the circuit court; and it is held that the justice's judgment, as to said defendant, remained unaffected by the appeal, and that said defendant was not entitled to enter his appearance in the circuit court, nor to a notice of trial. 50.
2. An order dissolving a preliminary injunction in so far as it interfered with the right of possession of land by the defendant, she being in such possession at time of the commencement of the suit, and directing that complainant restore the premises to the defendant, whose possession had been disturbed by him under said injunction, is not an appealable order. 263.

See CONDEMNATION PROCEEDINGS (5, 6); FORCIBLE ENTRY AND DETAINER (2, 3).

ARGUMENT TO JURY.

1. It is not error for the court to order counsel to desist from commenting in their argument to the jury upon alleged entries in books of account which, though inquired about on cross-examination, are not made evidence by the introduction of the books. 116 (4).
2. An attorney is entitled to some license in his argument, and the testimony to him may bear quite different inferences and

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ARGUMENT TO JURY—Continued.
conclusions than might be deduced by a disinterested and unbiased judge. 218 (2).
See CHARGE TO JURY (1); CRIMINAL LAW (1); EVIDENCE (2).

ASSIGNMENT—See MECHANIC'S LIEN.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The failure of an assignee under an assignment for the benefit of creditors to file the statutory bond will not entitle a mortgagee whose mortgage is fraudulent as to creditors to recover in an action of trover brought against the assignee for the value of the mortgage interest in the assigned property. 256 (2).
2. The filing and approval of a bond by an assignee under an assignment for the benefit of creditors after the statutory ten days will not operate to vest in him the title to the assigned property. *Id.* (3).
3. A deed executed prior to the passage of the statute regulating the making of assignments for the benefit of creditors, which purports to convey *all* of the grantor's property to the grantees in trust for the use and benefit of his creditors (with preferences), and which is signed and acknowledged by the grantor and grantees, and placed upon record in the proper office, is *upon its face* a valid conveyance of all the grantor's property for the uses therein stated. 301 (1).
4. Joining in such a deed, and placing it upon record after the execution was completed, is conclusive of acceptance by the grantees. *Id.* (2).
5. In such a case a creditor obtained a judgment against the assignor after the making and acceptance of the assignment deed, and levied upon a portion of the assigned land, which was sold without filing a bill in aid of execution. As a *matter of fact* the assignees never acted under or attempted to execute the trust, and some years after the execution sale they executed a quitclaim deed to the assignor of the land, who conveyed it by warranty deed. And in a suit in equity brought against the grantee in said warranty deed, in which the complainant claimed title to the land through the execution sale and attacked the assignment deed as fraudulent and void, it is held that the legal title passed to the assignees under the assignment deed, and was vested in them at the time of the execution sale, under which the purchaser

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ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

acquired, at the most, only the interest of the assignor at the time of the levy, and that he could not sell the land in the face of such assignment deed, and purchase it on such sale, and then seek in equity to set aside the assignment deed as fraudulent as to creditors, or because of the failure of the assignees to execute the trust for the creditors generally. *Id.* (3).

6. An assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor, by proof of an unlawful preference, or of "any fraud in the matter of such assignment." 543.

ATTACHMENT—See ASSIGNMENT FOR BENEFIT OF CREDITORS (6); SPECIFIC PERFORMANCE (1, 3).

BENEFIT ASSOCIATIONS.

The finance keeper of a subordinate tent of a mutual benefit association, whose duty it was to notify members of assessments, failed to give such notice to a member, and also failed to notify the association of the names of the members in arrear therefor, and under the laws of the order the subordinate tent was suspended. No notice of such suspension was given to the member, who was in good standing except as to the payment of said assessment, nor did the constitution, by-laws, or rules of the order require the giving of such notice at the time the member received his cirtificate. Before the reinstatement of the subordinate tent, the member died, having taken no steps to relieve himself of the forfeiture worked by such suspension. And it is held that the member was not entitled to notice of such suspension, of which it was evidently intended he would take notice, it being presumed, and not unreasonably so, that he would know when his tent was suspended. 92 (2).

See PARTIES (1).

BILLS AND NOTES.

1. The question upon which this case turned was whether the plaintiff was an innocent purchaser of a note the consideration for which was a "Red Lyon Wheat Note," which fact was found against the plaintiff under a charge which is held to have been sufficient to enable the jury to reach a conclusion upon the facts in harmony with the law of such cases as laid down by this Court. 136.

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BILLS AND NOTES—Continued.

2. A promissory note payable to the "order of Marget A. Bitzer (or bearer)" is payable to bearer, and suit can be maintained thereon in the name of any holder. 223.
3. An agent to whom negotiable paper is indorsed for collection may sue thereon in his own name (*Moore v. Hall*, 48 Mich. 143) if his indorser could have maintained the action. 555 (1).

See DISCONTINUANCE; EVIDENCE (20); MORTGAGE (2–4).

BOARD OF CANVASSERS OF DETROIT—See ELECTION.

BONA FIDE HOLDER—See CHATTEL MORTGAGE (4).

BONA FIDE PURCHASER.

1. Notice to the purchaser of a mare that she had been bred to a certain stallion is not sufficient to put him on inquiry as to any rights the owner of the stallion might have or claim growing out of such fact. 348 (2).
2. Before concluding a purchase of real estate, the vendee learned that third parties were in possession, as tenants, as claimed by the vendor, which information is held sufficient to put him upon inquiry, and to charge him with a knowledge of all of the facts which he might have learned by making such inquiry of the alleged tenants. 395 (1).
3. The making and depositing in *escrow* of the note of the vendee, to be delivered to the vendor when the vendee was given a good title to and possession of the land contracted for, is not such a payment of money as entitles the vendee to the rights of a *bona fide* purchaser for value. *Id.* (2).
4. Whatever the rule may be in the case of negotiable instruments, it is well settled that a conveyance of lands or chattels, as a security for an *antecedent* debt, will not operate as a *purchase for value*, or defeat existing equities. 442.

BOND—See ASSIGNMENT FOR BENEFIT OF CREDITORS (1, 2); APPEAL (1); FORCIBLE ENTRY AND DETAINER (3); LIQUOR TRAFFIC (1).

BOOKS OF ACCOUNT—See EVIDENCE (19).

BREACH OF COVENANT—See EVIDENCE (11).

BUILDING CONTRACT—See CONTRACT (1, 2).

CHANCERY APPEAL—See APPEAL (2).

CHARGE TO JURY.

1. It is highly proper, and oftentimes the duty of the trial

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CHARGE TO JURY—Continued.

judge in his charge, to refer to and comment upon the statements of the counsel in their arguments, and he who objects to such comments must show by the record that he has been misquoted. 174 (4).

2. Where in a malpractice case the declaration alleges that in setting plaintiff's broken leg the defendant was guilty of negligence, and that he negligently and carelessly injured the ligaments of the knee, resulting in permanent lameness and deformity, a charge which treats the question at issue as one of neglect in the care of the broken limb, rather than as one of an injury to the knee, caused by such alleged negligence on the part of the defendant, is erroneous. 311 (2).

See CRIMINAL LAW (2, 3).

CHATTEL MORTGAGE.

1. An agreement by the vendee of a stock of goods to repay a loan, made to enable her to make the purchase, out of the first proceeds realized from the sale of the goods, and before the payment to the vendor of the balance of the purchase price, is not equivalent to an agreement to *secure* the loan by a chattel mortgage on the goods. 165 (1).
2. The *rights* of a vendor who takes possession of the property, with the consent of the vendee, under a bill of sale intended as security for the payment of the unpaid purchase money, and who is in such possession when the vendee executes a chattel mortgage to secure a pre-existing indebtedness, are superior to those of the mortgagee or of his assignee, although the bill of sale is not filed at the time of the execution and filing of the mortgage. *Id.* (2).
3. The rights of a pledgee in possession are superior to the lien of a mortgage given pending such possession. *Id.* (3).
4. The owner of a stock of goods mortgaged them to secure an indorser, and the mortgage was filed in the proper office, after which he sold the goods, and agreed with the purchaser to secure a release of the mortgage. The purchaser secured the payment of a portion of the purchase price by a mortgage on the goods, which was assigned with his consent, and placed on file. The vendor informed the first mortgagee of the sale, and that the vendee desired to give another mortgage running a year, and have the first one released;

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CHATTEL MORTGAGE—Continued.

to which the first mortgagee consented, and executed the release, with the understanding that he was to have the same interest in the new mortgage as he held in the one he discharged. He received a receipt showing the filing of such a mortgage in the proper office, but as a matter of fact the vendor procured and filed an assignment to him of the second mortgage. The vendee, claiming to have been defrauded in the amount and value of the goods sold him, sought to rescind the sale, and attached the goods, which were replevied by the first mortgagee, and on the trial of the replevin suit the vendee claimed that the vendor and assignee of the second mortgage were agents of the first mortgagee, and that he, being properly chargeable with their knowledge of the alleged fraud, was not a *bona fide* holder of the second mortgage and note. In affirming a judgment in favor of the plaintiff it is held:

a—The mere fact that the mortgage was given to the vendor, and by him assigned, and assigned by his assignee to the plaintiff at the request of the vendor, would not create such agency.

b—The court would have been justified in instructing the jury that there was no evidence in the case showing any such notice or knowledge on the part of the plaintiff of the alleged fraud as should put him upon inquiry as to the *bona fides* of the mortgage he was to take in place of the one he discharged, which was not due at the time, and in taking which the plaintiff could not be placed in any different position than that occupied by him under his first mortgage. 499, 500.

See EXEMPTIONS; PAYMENT.

CITY BOARD OF CANVASSERS OF DETROIT—See ELECTION.

CIVIL WARRANT—See AFFIDAVIT.

COMMERCIAL AGENCY—See FRAUDULENT PURCHASE.

COMMON COUNTS—See PLEADING (5).

COMPROMISE—See FRAUDULENT PURCHASE (1).

COMPUTATION OF TIME—See NOTICE.

CONDEMNATION PROCEEDINGS.

1. The question whether the map and survey required to be filed to designate the route of a railroad is sufficient for the

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CONDEMNATION PROCEEDINGS—Continued.

identification of the property sought to be acquired by condemnation proceedings, without the aid of other maps or information, is a jurisdictional one, to be determined by the court on the application for the appointment of commissioners. 33 (2).

2. The following oath to the jury in condemnation proceedings under the Union Depot Act of 1881 is sufficient, namely, that they would "justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause." 265 (3).

3. The negotiations for the purchase of property required by the statute before instituting proceedings for its condemnation contemplate *knowledge* on the part of the land-owner of the *purpose* for which the land is wanted. 415 (1).

4. A *bona fide* offer by a railroad company of an amount which it considers a fair price for land, and a refusal by the owner to accept it, are sufficient negotiations, within the condemnation statute; and it is of no consequence that the agent making the offer had no expectation that it would be accepted. *Id.* (2).

5. In condemnation proceedings the jury are judges of law and facts, and their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, as much as the testimony of witnesses to matters of opinion; citing *Railway Co. v. Dunlap*, 47 Mich. 466; and appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result. *Id.* (3).

6. While, under the statute, this Court may, upon appeal, set aside an award of a jury in condemnation proceedings, and order a new appraisal, this should only be done where it is clear that the award is against the evidence. *Id.* (4).

See NOTICE; QUESTIONS TO JURY.

CONDITION AS TO BUILDING—See CONTRACT (1, 2).

CONSIDERATION.

1. An agreement to pay that which the promisor has already contracted to pay does not constitute a consideration for a *new* promise to perform the same contract. 241.

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CONSIDERATION—Continued.

2. A promise by the payee in a note, made after its maturity, to receive in payment 200 posts for $10, and apply the same upon the note, the maker agreeing to get out the posts as soon as his fall's work was done, and have them ready for delivery upon his farm, is without consideration, and of no validity until performed by the delivery and acceptance of the posts. 262.

See EVIDENCE (20).

CONSTITUTIONAL LAW.

1. Act No. 223, Laws of 1889, as introduced, was entitled "A bill authorizing and empowering the township treasurers of the county of Kalkaska, in the State of Michigan, to force the collection of taxes in certain cases," while the title to a substitute reported after the first fifty days of the session was "A bill to authorize the issuance of injunctions to restrain waste upon certain lands when the taxes upon the same shall be due and unpaid." And it is held that the titles relate to the same subject-matter, and that, in the absence of the original bill, it will be presumed that its provisions were germane to the object expressed in its title; that the sole object in restraining waste is "to *force* the collection of the taxes;" and that the right to enlarge or limit the territory within which such acts shall be operative under bills which, as introduced, include a part or all of the State, has never been questioned, and that this can be done as well after the fifty-day limit as before. 13 (1).

2. Act No. 214, Laws of 1889, providing for the payment by township and city treasurers to the county treasurer of the dog tax collected by them, to be kept as a special fund for the payment of losses suffered from the killing or wounding of sheep, is constitutional. 236 (1).

3. The Union Depot Act of 1881 (Act No. 244) is not unconstitutional in that it confers the power of eminent domain upon the corporations organized under it, and the title is sufficient to warrant the conferring of such power. 265 (1).

4. The objection that section 30 of the Union Depot Act of 1881 embraces an object not stated in its title, namely, the establishment, maintenance, and operation of railroads independent of depot purposes, and having no connection therewith, is untenable. *Id.* (2).

5. The one *object* of the tax law of 1889 (Act No. 195, Laws

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CONSTITUTIONAL LAW—Continued.

of 1889) is to provide for the collection of the revenue of the State, whether uncollected at the time of its passage or to be levied and collected in the future, which object is fully expressed in the title. 460 (1).

6. It was competent for the Legislature to provide for the sale of lands delinquent for taxes assessed and returned prior to the year 1889, under the provisions of the tax law of 1889, which gives a new remedy, in the enforcement of which the rights of the tax-payer are protected, and he is given a day in court, with an opportunity to allege and show the invalidity of the tax. 471 (1).

7. The drain law of 1885 (Act No. 227), in so far as it provides that drain taxes levied under the drain law of 1881 (Act No. 269) shall be a personal claim against the land-owner until paid, is invalid. 576 (2).

8. It is for the Legislature, and not for the courts, to determine what are *reasonable* maximum rates of charges for the transportation of passengers and freight on the different railroads of the State, under the power conferred by section one of Article 19*a* of the Constitution. 592 (1).

9. Act No. 202, Laws of 1889, which fixes a maximum charge for the transportation of passengers on the different railroads of the State, upon the basis of their gross earnings per mile, and which in so doing distinguishes between railroads located in the Upper Peninsula and those in the Lower Peninsula, is constitutional. *Id.* (2).

CONSTRUCTION OF CONTRACT—See CONTRACT (1).

CONSTRUCTION OF WILL—See WILL.

CONTRACT.

1. A land contract contained a clause requiring the *erection* by the vendee on the premises of a dwelling-house of a specified character and description, to be located a certain distance from the street line, on which street the vendor owned other property. It was also provided that the deed to be executed on performance of the vendee's covenants was to be subject to said house-line and building restrictions, which are held complied with by the vendee by *moving onto the land* a house of the agreed character and dimensions, and placing the same in the position agreed upon as regards the street line. 7 (1).

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CONTRACT—Continued.

2. In such a case the vendor is entitled to have the like conditions inserted in his deed of the premises, and to insist upon their performance so long as they are of any benefit to him or his grantees. 8 (2).
3. An agreement by a retail grocer to include in his annual order for canned goods a certain amount for a commercial broker residing in the same city, to be paid for on delivery, is held not to make a case of bargain and sale, but of agency. 159 (1).
4. In such a case a request by the broker, made the following year, to order goods "the same as the year before," is held to include payment on delivery. *Id.* (2).
5. Where in such a case the second order was amended by changing the variety of tomatoes included therein, which change was not made, but the broker did not base his refusal to receive the goods sent on that ground, he cannot urge that as a defense in a suit by the grocer to recover the purchase price, which he had paid to the vendors. *Id.* (3).

See CONSIDERATION.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (2–4, 6–8).

CORPORATIONS.

1. Courts of equity will not interfere in the management by the directors of the affairs of a corporation unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders. 68.
2. Whether a corporation is exercising a franchise or right within legislative authority is a question to be inquired into by the State. 285 (1).
3. After the passage of Act No. 6, Laws of 1889, authorizing the incorporation of associations for exposition and exhibition purposes, the defendant became a subscriber to a preliminary subscription paper by which the signers agreed to subscribe for and take stock to the amount set opposite their names in

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CORPORATIONS—Continued.

a corporation, which the agreement stated they believed should be organized, with a capital stock of at least $250,000, for the purpose of purchasing suitable grounds and erecting suitable buildings thereon, upon a plan similar to the Buffalo Exposition, which subscriptions were not to be binding unless the sum of $100,000 was subscribed within sixty days from the date of the agreement, which condition had been complied with prior to the passage of said act. The corporation was duly organized with a capital stock of $500,000, of which over $250,000 was subscribed. The articles of association were not signed by the defendant, nor did he subscribe for any of the capital stock, except as before stated, but he attended a meeting called to select a site after such incorporation, and voted stock to the amount of his subscription. Grounds were purchased, and the corporation accepted the subscriptions, and tendered to the defendant stock to the amount of his subscription, which was refused, as also payment of the amount subscribed, and the corporation brought suit to recover the same, on the trial of which a verdict was directed for the defendant; and in reversing the judgment entered thereon it is held:

a—That the object sought to be accomplished by the preliminary agreement was a lawful one, and the promises therein contained mutual; that the acts done and moneys expended were in reliance upon the original subscriptions, and that there can be no difficulty in enforcing the agreement at the common law; and that the case falls so squarely within *Railway Co. v. Duncan*, 28 Mich. 130, as to render a discussion of the objection that the subscription paper is not a contract, and that it has no legal force or effect, unnecessary.

b—Knowing the amount of the capital stock called for by the articles of association, and the amount subscribed, defendant attended the meeting and voted his stock, as before stated, by which action he must be held to have assented to the articles of association increasing the amount of the capital stock; and, having acted with the other subscribers, upon the assumption that they intended to proceed with the stock partially subscribed, defendant cannot now be heard to say, as a defense to this action to recover for his subscription, that the amount of the capital as provided for in the

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CORPORATIONS—Continued.

articles of association is greater than contemplated in his subscription, or that it has not all been paid in; citing *Proprietors v. Chapin*, 6 Cush. 50.

c—The objection that, under the act, no action on a stock subscription can be sustained except for any deficiency that may exist after a sale of the stock in the manner prescribed by the act, is without force. The action is not brought to recover against a stockholder as such, but upon the agreement to pay the sum subscribed by the defendant to the use of the corporation thereafter to be organized, and for the purposes named in the contract. The other subscribers have paid, and the moneys have been expended. The corporation has been organized as provided in the preliminary subscription, and it has now become entitled to the money, and to maintain an action for its recovery upon the record as now presented. 386–388.

See LABOR DEBTS; PARTIES (4); PRINCIPAL AND AGENT (4).

COSTS.

A land-owner who is compelled to appear and answer a bill filed by a subcontractor to enforce a mechanic's lien, and who discloses the exact amount unpaid on the contract, and proffers payment of such sum to the person who shall be adjudged entitled thereto,—the same being claimed by an assignee of the contractor,—is entitled to his costs. 478 (8).

COVENANT AGAINST INCUMBRANCES — See DAMAGES (1); DEED.

CREDITOR'S BILL—See PARTIES (4).

CRIMINAL LAW.

1. A statement by the prosecuting attorney in his closing argument to the jury in a homicide case that the people were not bound by the testimony of a witness whose testimony they were bound to introduce, except in so far as it was believed to be true, is not open to objection. 273 (1).
2. The failure of the court in his charge in a homicide case to give a technical definition of the crime of manslaughter cannot be assigned as error, where upon the theory of the respondent he was guilty of that offense, and which theory the court plainly placed before the jury with instruction that, if found to be true, the respondent was guilty of manslaughter. *Id.* (2).

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CRIMINAL LAW—Continued.

8. Where on the trial of a homicide case it was admitted that the respondent was guilty of manslaughter, but the theory of the defense was that he was innocent of the higher offense charged because of a want of criminal intent, a charge which gives to the respondent the presumption of innocence of such intent, and the benefit of any reasonable doubt the jury might entertain as to the intent with which he acted, is not open to the objection that the court did not instruct the jury that the presumption of innocence was with the respondent. *Id.* (3).

See LIQUOR TRAFFIC (2, 3).

CRITICISM—See LIBEL AND SLANDER (*a*, *b*).

DAMAGES.

1. Where it is shown by parol that, after the delivery of a deed with a covenant against incumbrances, the grantee accepts an existing tenancy and receives the rent from the tenant, the amount of rent received is properly deducted from the damages found in his favor in an action for breach of such covenant by reason of such outstanding tenancy. 246 (*c*).
2. Where the damages are capable of accurate *pecuniary* estimation, exemplary damages can never be allowed. 522 (1).

DECREE—See MORTGAGE (1); PRINCIPAL AND SURETY (2).

DEED.

1. A deed, with a covenant against incumbrances, passes to the grantee the right to collect rent from a tenant, which he cannot prevent by refusing to attorn to the grantee. 246 (*a*).
2. It is as usual, and certainly as competent, to covenant against known as unknown incumbrances or defects of title, and with such a covenant the purchaser is not called upon to exercise any diligence. *Id.* (*b*).

See ASSIGNMENT FOR BENEFIT OF CREDITORS (3–5); CONTRACT (2); DAMAGES (1); MARRIED WOMAN'S ACT.

DEFINITIONS.

Criticism. 583 (*a*, *b*).

DEPOT—See UNION DEPOT ACT OF 1881.

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DIRECTING VERDICT.

In this case plaintiff sought to recover the value of a horse whose leg was broken, as alleged, by defendant's throwing a stone while chasing the animal from his father's wheat field. And it is held that a verdict should have been directed in favor of defendant for want of evidence tending to make out plaintiff's case. 145.

DISCHARGE OF MORTGAGE—See PAYMENT.

DISCHARGE OF SURETY—See PRINCIPAL AND SURETY.

DISCONTINUANCE.

A discontinuance as to a married woman, who was one of four payors in a *joint* promissory note, in a suit on the note, will not prevent the rendition of a valid judgment against the remaining defendants. 412 (1).

DIVIDENDS—See CORPORATIONS (1).

DIVORCE.

1. It is for services in *introducing* evidence, appearing at the hearing, and *opposing* the granting of a decree of divorce that the statute (Act No. 187, Laws of 1887) allows the prosecuting attorney five dollars, payable by the county treasurer upon the certificate of the circuit judge that such services have been rendered. 1 (1).
2. Occasional intoxication is not habitual drunkenness in a woman any more than it is in a man. 150 (1).
3. The strong man ought to relinquish the gratification of the same appetite for drink that he asks the weak woman to give up. *Id.* (2).
4. In this a case divorce was granted in the court below on the grounds of habitual drunkenness and extreme cruelty, which decree is reversed for reasons stated in the opinion. *Id.* (3).
5. A husband deeded to his wife his homestead, worth from four to five thousand dollars, and gave her all of the household furniture, which constituted the bulk of his property. For some time after his wife refused to cohabit with him, he was allowed the privilege of a room in this house, but was finally driven from it, and his wife moved to another city, and rented the homestead to strangers, which action on the part of the wife is held to be extreme cruelty. 819.

See STATUTES CONSTRUED (1).

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DOG TAX—See CONSTITUTIONAL LAW (2).

DRAIN LAW OF 1885—See TAXES (13, 14).

EJECTMENT.

1. An employé of a defendant in ejectment, who was permitted to move into the house on the premises, and lived therein when the suit was commenced, but who claimed no rights in the land as tenant or otherwise, is not a necessary party defendant. 322 (1).
2. The right of *possession* of a plaintiff in ejectment under color or claim of title may be *prima facie* title as against a mere intruder, but when a defendant shows an equitable interest in the land, unconnected with and independent of plaintiff's claim of title, he may show in defense plaintiff's want of title. *Id.* (2).
3. In the cases in which it has been held that an equitable title cannot be set up in ejectment against the legal title, the legal title was fully established, and the evidence of the equitable title was sought to be introduced to overthrow the legal title, which, without such evidence, was admitted. *Id.* (3).

ELECTION.

The duty of the city board of canvassers of election of Detroit is *purely clerical*,—to foot up the returns of the boards of inspectors, and declare the result, and issue certificates accordingly,—and the performance of this duty will be compelled by *mandamus*. 367.

ELECTRICITY—See EQUITY (1, 3).

EQUITY.

1. A mere *apprehension* that injury *may* result to the property of a complainant by the substitution by a street railway company of electricity as a motive power will not warrant the court in perpetually enjoining such action on the part of the company. 285 (2).
2. It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all of the facts and circumstances, and grant or withhold relief as the justice or equity of the case may require. 286 (3).
3. In this case complainant sought perpetually to enjoin the

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EQUITY—Continued.

use of electricity by defendant as a substitute for horse power in the operation of a street railroad in a street upon which complainant owned *vacant* land. And it is held that the granting of an injunction would cause the defendant far greater loss than complainant will suffer, if all of his apprehensions prove true; and that, if he has the rights he claims, he has a remedy at law for their violation, to which he should be remitted under the facts developed in this case. *Id.* (4).

See APPEAL (2).

EQUITY JURISDICTION.

In this case it is held that complainant has an adequate remedy at law, and that equity has no jurisdiction over the controversy, and that it would be improper to express any opinion upon the other questions presented. 11.

See SPECIFIC PERFORMANCE (2, 7).

EQUITY PRACTICE.

In this case it is held that the personal representatives of a deceased trustee, who received the fund in which complainants were interested, and of which they claim to have been defrauded, are necessary parties, and the case is remanded, with leave to complainants to join such representatives as defendants, and, after issue is joined, further proofs to be taken, those already taken to stand as proofs in the cause. 653.

EQUIVALENT STATEMENTS.

A statement by a purchaser of goods to the vendor, "You may charge them to me," is equivalent to saying, "You may charge them to me *individually*." 116 (1).

ESTATES OF DECEASED PERSONS.

By his will a father devised his real estate to eight of his nine heirs, and bequeathed to the ninth heir his personal property. At the time of the father's death *this* heir was in possession of a portion of the real estate under a lease from his father, which was to terminate at his death. The heir admitted his liability to pay the rent to the administrator, who allowed him to remain in possession upon his executing an agreement authorizing the administrator to withhold from his

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ESTATES OF DECEASED PERSONS—Continued.

share of the estate, on final distribution, the rent due and to become due, which share was declared to be security for such rent. Pending an appeal from the disallowance of the will, an order was made by the probate court for the delivery of the real estate to the heirs, from which order the *one* heir appealed for the reason that the personal property was insufficient, as claimed, to pay the debts and expenses of administration, and that it was necessary for the administrator to retain possession of the real estate and apply the rents and profits towards such payment. The share of the heir in the personal property, if the will was disallowed, was insufficient to pay the rent, but the rent was not required for the payment of debts and expenses of administration. On the failure of the heir to pay the rent, the administrator instituted summary proceedings to recover possession, and in affirming a judgment in his favor the Court distinguished this case from *Rough v. Womer*, 76 Mich. 381, and hold that the circumstances detailed in the findings (the substance of which are above stated) show that a necessity exists for the administrator to take possession of the real estate for his own protection, whatever may be the outcome of the proceedings to probate the will, for the purpose of collecting the rents and profits with a view to pass them over to the executor if one is appointed, or to a just and fair distribution of the estate if such appointment is not made. 44.

ESTOPPEL—See CORPORATIONS (3*b*).

EVIDENCE.

1. Suit was brought against a married woman to recover for goods claimed to have been purchased by her on her *individual* credit, which was denied by the defendant; and the following questions put to the plaintiff are held proper, as calling for testimony tending to show that the credit was extended to the wife, namely:

a—If prior to such sale he had not attempted to collect a claim of long standing of the husband.

b—Whether he would have charged the goods to the husband if requested to do so by the wife.

c—Whether the claim which he had attempted to collect was not litigated in the same court in which the trial was being had, and the case taken to the Supreme Court.

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EVIDENCE—Continued.

d—Also the following question, asked of the wife, namely: Whether it was not a fact that, about the time of the purchase of the goods, her husband "wasn't paying anybody." 116 (2).

2. Counsel for plaintiff, in closing the case to the jury, assumed to state what took place on the trial of the case in justice's court, and the defendant's counsel asked that the return of the justice be admitted in evidence to contradict such statement. And it is held that the return was properly excluded, the assertion of counsel being no evidence of the proceedings before the justice, which were irrelevant, and ought not to have been referred to. *Id.* (3).

3. Where a deed is executed to husband and wife, and the relationship is not stated in the deed, it may be shown by parol testimony. 131 (2).

4. Evidence of the *fracture* of plaintiff's arm is admissible under a declaration averring that his arm and leg were "cut, sprained, bruised, wounded, and injured," and that he was "so injured in his said arm and leg as to permanently injure and cripple him for life." 173 (1).

5. Resolutions of a village council ordering the repair of a sidewalk, passed from time to time during the two years preceding the injury complained of, are admissible to show knowledge on the part of the village of condition of the walk, when accompanied by proof of its non-repair and of continued bad condition. *Id.* (2).

6. In such a case a witness for the plaintiff, who had testified to the bad condition of the walk prior to the accident, was asked to state how or in what manner he had discovered its condition, and answered that the boards were loose, and jiggled under his feet, and that he stumbled on the boards, and had seen others stumble, but without falling down. And it is held that both the question and answer were competent, the question not necessarily opening the door to collateral issues, and falling within the spirit of the rule adopted in *Smith v. Sherwood Township*, 62 Mich. 159. *Id.* (3).

7. The judgment record in a suit upon a replevin bond brought in the state of Indiana showed a copy of the bond set out at length in the complaint, as the only cause of action relied on; and it is held that it will be presumed in support of the

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EVIDENCE—Continued.

judgment that it was rendered after due proof of the execution of the bond declared on. 200 (2).

8. Where a paper is beyond the jurisdiction of the courts of this State, its contents may be shown by secondary evidence. *Id.* (3).

9. Where, after proving the amount due on an open account by the admissions of the debtor, an affidavit of the amount due, made and served pursuant to How. Stat. § 7525, was received in evidence against the objection of the defendant, the reception of such evidence, even if inadmissible, is non-prejudicial error. 226 (2).

10. A mortgagee sold two of three mortgage notes, and assigned a corresponding interest in the mortgage, which fact was stated in the assignment. And it is held that parol testimony is inadmissible to show an alleged agreement that the assignee was to have a priority of lien under the mortgage as security for the payment of his notes. 231 (2).

11. In an action for breach of covenant, *parol* proof is inadmissible to show that an existing incumbrance was agreed by the parties to be regarded as in fact no incumbrance. 246 (1).

12. The authority of a husband to act for his wife cannot be shown by his declarations, nor will it be presumed from the circumstance that he has acted for her in other matters, but it must be established, like any other fact, by competent evidence. 253.

13. The plaintiff in a malpractice case was asked to state whether or not the pain in her knee and the difficulty that she had experienced from it, including the swelling, was, as far as she could tell by any feeling, connected with the point of injury where her leg was broken; the answer to which question is held to have been properly excluded, the witness not being an expert, and therefore not competent to testify as to what was the *cause* of such pain. 311 (1).

14. The court instructed the jury in a malpractice case that they were necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons, when they came to determine whether, on the facts in the case, the defendant had treated the case in a proper form, and by the use of proper appliances, and in the same connection stated that no other witnesses than such physicians and surgeons had undertaken to testify on that

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EVIDENCE—Continued.

subject; which instruction is held unobjectionable, it being the province of the other witnesses to give the facts as to the treatment and acts of the defendant, and for the physicians and surgeons to say whether or not the same were proper. *Id.* (3).

15. Where a witness makes use of *memoranda* in testifying, and swears that he could not testify to the exact figures without its aid, and to that end had used it throughout his direct examination, the attorneys for the opposing party are entitled to an inspection of the paper to enable them to cross-examine the witness. 419 (2).

16. Insolvency may always be submitted to a jury, with other facts, to show an intention to defraud in the purchase of goods. 450 (1).

17. While the mere fact of insolvency will not prevent a merchant from purchasing goods on credit with the good-faith intention of paying for them, and, standing alone, is not a badge of fraud, yet, in this case, such fact, coupled with the existence of a large mortgage on the vendee's stock of goods, and its concealment from the vendors, furnished some evidence tending to show fraud in the purchase of the goods from them. *Id.* (2).

18. An affidavit attached to a claim of lien filed in the office of the register of deeds, in which the deponent states that he served a true copy of the foregoing statement or claim of lien by "delivering the same to *him* personally," is *prima facie* proof that such service was made upon the owner of the land upon which the lien is sought to be enforced, who is named as such in such claim or statement, when offered in evidence in connection with the claim to which it is attached. 478 (1).

19. An entry in the handwriting of a deceased party, made in a day-book kept by him in his life-time in the regular course of business, is competent evidence. 486.

20. It is always competent to show the consideration for which a promissory note was given unless the rights of a *bona fide* purchaser have intervened. 487 (2).

21. In a libel suit brought by a juror against the proprietor of a newspaper for charging that the jury in a certain case, of which the plaintiff was a member, perjured themselves in rendering their verdict, the plaintiff cannot be questioned

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EVIDENCE—Continued.

concerning the verdict, or his motives or reasons for finding the same; such mode of questioning falling within the prohibition of How. Stat. § 7608, abolishing the common-law remedy of attaint upon untrue verdicts. 661 (2).

22. On the trial of a libel suit brought by a juror against a newspaper proprietor for charging that a jury of which plaintiff was a member perjured themselves in rendering their verdict, and in which the defendant gave notice of justification, the plaintiff was asked on his direct examination if any influence other than that of the evidence and instructions of the court and arguments of counsel was brought to bear upon him in the consideration and finding of his verdict, which question is held to call for immaterial testimony, no such fact being in issue. *Id.* (4).

23. Plaintiff's counsel offered in evidence a paper signed by the plaintiff and the other members of the jury, requesting the defendant to retract the alleged libelous charge, which was admitted, but its reading to the jury made subject to proof that it reached the defendant, which ruling is sustained. *Id.* (5).

24. The plaintiff was allowed to be asked on cross-examination if there were not publications in all of the newspapers in the city where the verdict was rendered in which it was severely criticised, which is held not to have been an abuse of the discretion of the trial court, the alleged libelous article having characterized the verdict as extraordinary, and the testimony tending to show that it was so regarded by the public. *Id.* (6).

25. Evidence of the publication by a defendant in a libel suit, after its commencement, of an article in which the alleged libelous article was republished, with comments thereon, is admissible as showing malice on the part of the defendant. *Id.* (7).

See DIRECTING VERDICT; FRAUDULENT CONVEYANCE; MORTGAGE (3); PRINCIPAL AND SURETY (2).

EXECUTION—See ASSIGNMENT FOR BENEFIT OF CREDITORS (5, 6); JUDGMENT CREDITOR'S BILL; SPECIFIC PERFORMANCE (1, 3).

EXECUTION OF WRITTEN INSTRUMENT—See PRACTICE IN CIRCUIT COURT (2-4).

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS.

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EXEMPLARY DAMAGES—See DAMAGES (2).

EXEMPTIONS.

How. Stat. § 7686, providing for exemptions, does not apply to chattel mortgages executed by one partner in the firm name, although his copartners may be ignorant of their execution. 506 (2).

See TAXES (10, 15, 16).

EXPERTS—See EVIDENCE (13, 14).

EXTREME CRUELTY—See DIVORCE (5).

FALSEHOODS—See LIBEL AND SLANDER (*c*).

FELLOW-SERVANT—See NEGLIGENCE (4).

FINDINGS OF FACT.

1. Error cannot be assigned upon the action of the trial judge in permitting the attorney for the prevailing party to prepare a draft of proposed findings of fact in the case. 357 (1).
2. It is the province of the circuit judge, sitting as a trial court, to find all the facts which the testimony in the case *tends* to prove, and all inferences of fact which are or may be drawn from the testimony must be drawn by the trial court; and the appellate court cannot draw any inferences from the testimony contrary to the facts found by the court below. 358 (2).

See PAYMENT.

FIRE INSURANCE.

1. A dwelling-house from which a tenant had removed with no intention of returning, although he had left some goods in the house which he did not need at the time for the purpose of housekeeping, and which remained so unoccupied for two days, when it was destroyed by fire, is held to have been *vacant* within the rule laid down in *Bonenfant v. Ins. Co.*, 76 Mich. 653, which question of vacancy, upon the facts stated, is held to have been one of law for the court. 508.
2. In such a case a statement by an insurance adjuster to the assured that the company considered the house vacant, but were not going to be technical about the matter, being satisfied that he had sustained the loss, and an offer to pay $450 and cancel the policy, which called for $900, a sum less than the value of the property, will not amount to a waiver of the right to forfeit the policy under a clause providing

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FIRE INSURANCE—Continued.
for such forfeiture in case the house became vacant or unoccupied. 509.

FORCIBLE ENTRY AND DETAINER.

1. After a defendant had taken an appeal from a judgment of restitution in a summary proceeding to recover possession of lands, he served a notice upon the complainant that he would quit the premises on a certain date, and requested him to divide the property on the leased premises, and subsequently left the land. And it is held that he did not thereby satisfy the judgment appealed from, or admit that he was holding possession unlawfully when the suit was commenced, but that such surrender was an act entirely independent of the judgment and prior proceedings. 24 (1).
2. An affidavit in the form commonly used on appeal from justices' courts, which alleges that a judgment has been rendered against the appellant whereby he is required to leave and deliver up possession of a farm to the appellee, is sufficient on an appeal from a judgment of restitution rendered in a summary proceeding under the statute to recover the possession of the farm. *Id.* (2).
3. How. Stat. § 8307, providing for an appeal from judgments in summary proceedings to recover the possession of lands, does not, in express terms, provide that the commissioner shall indorse on the bond either that he has fixed the penalty or approved the bond; and when a bond is accepted in a certain penalty, and an appeal granted by making a return of the proceedings had before the commissioner, with the affidavit and bond on such appeal, it will be presumed in favor of the jurisdiction of the appellate court that the commissioner not only approved the bond, but fixed its penalty according to law. *Id.* (3).

See ESTATES OF DECEASED PERSONS.

FORECLOSURE—See MORTGAGE.

FORFEITURE—See BENEFIT ASSOCIATIONS.

FRAUD—See FRAUDULENT PURCHASE.

FRAUDULENT CONVEYANCE.

This case involves the alleged fraudulent conveyance of a mortgaged homestead, and other land, by a husband to his wife, in consideration of the release of her dower in other real

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FRAUDULENT CONVEYANCE—Continued.

estate owned by him, and which he desired to dispose of, and of $200 claimed to be due her for improvements made upon the homestead; and it is held by a majority of the Court that the proofs fail to establish the fraud charged. 549.

See ASSIGNMENT FOR BENEFIT OF CREDITORS (5).

FRAUDULENT PURCHASE.

1. A defrauded vendor does not lose his right to rescind by making an effort to compromise or obtain payment for the property, unless he does some act which evinces a clear intention to waive such right. 419 (1).
2. This Court has not gone so far in any case as to hold that traders must report to the commercial agencies every variation in their circumstances. *Id.* (3).
3. It is only when traders are in an insolvent condition, and are or should be aware that they will be obliged to suspend or fail in their business, that they owe it as a duty to creditors, or those they solicit to deal with them upon credit, to inform them of their situation, or to notify the commercial agencies of their changed situation, and purchases not made in good faith, while in such straits, may well be regarded as fraudulent. *Id.* (4).
4. Fraud cannot be predicated upon the fact that a merchant or trader makes a truthful representation of his standing to a commercial agency, and thereby obtains credit. If a considerable time elapses, and no new representations are made, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the agency. 420 (5).
5. Fraud is a question of fact to be deduced from all of the circumstances, and a vendor cannot shut his eyes to subsequent reports of the commercial agencies tending to cast doubt and suspicion upon the financial ability and credit of a merchant or trader, and rely upon a year-old statement made by such person. *Id.* (6).
6. In this case the jury found specially that the defendant was worth $5,000, or more, over and above all liabilities, when he purchased the goods of the plaintiff which are sought to be

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FRAUDULENT PURCHASE—Continued.

reclaimed, and at that time he intended to pay for them, which finding is held to be inconsistent with any verdict except in favor of the defendants. *Id.* (7).

FROG BILL—See RAILROAD COMPANIES.

GARNISHMENT.

Act No. 244, Laws of 1889, amendatory of How. Stat. §§ 8059, 8091, which extends their operation so as to enable creditors to reach the *value* of property of the principal defendant received and held by the garnishee under a conveyance or title void as to creditors, and which he has disposed of, applies to garnishment proceedings instituted *after* the act took effect, although the goods were received and disposed of *prior* to that date. 153.

GOOSE CASE—See REPLEVIN.

GRADED FARE LAW OF 1889—See CONSTITUTIONAL LAW (8, 9).

HABEAS CORPUS.

1. The fact that the superintendent of the insane asylum is liable to be harassed with a suit for false imprisonment for detaining an inmate under a void commitment shows sufficient interest in him to ask for a review of an order discharging such inmate on *habeas corpus* proceedings. 528 (4).
2. The writ of *habeas corpus* penetrates the walls of insane asylums as fully and freely as any other place where persons are illegally restrained of their liberty; and orders and decrees of probate courts possess no immunity different from those of other courts when they proceed without jurisdiction. *Id.* (5).
3. The person upon whom a writ of *habeas corpus* is duly served is required by How. Stat. § 8565, to state in his return, plainly and unequivocally, the authority and true cause of the imprisonment or restraint complained of, setting forth the same at large, and, if by virtue of any writ, warrant, or other written authority, to annex a copy thereof to his return, and to produce the original to the court or officer before whom the writ is returnable. But on a review of such proceedings by *certiorari* in the Supreme Court, where it appeared that this statute was not complied with, but that no objection was made, and that the petitioner produced the order of commitment under which she was detained on

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HABEAS CORPUS—Continued.

the hearing, the Court regarded the order as the authority for such detention. 529 (7).

4. The order for discharge in this case is vacated, without costs, but without an order remanding the person discharged to the insane asylum, under the precedent established by *Hamilton's Case*, 51 Mich. 174. *Id.* (9).

HABITUAL DRUNKENNESS—See DIVORCE (2, 4).

HIGHWAYS.

1. Proceedings to discontinue a highway, and lay out a new one, and build a bridge cannot be united in one proceeding. 193 (1).
2. The statute requires ten *full* days' notice of the hearing by the commissioner of a petition to lay out a highway. *Id.* (2).
3. Proceedings for laying out a highway are void unless the commissioner's return shows that he determined the necessity for such action. *Id.* (3).
4. Proceedings for laying out township-line road must be taken *jointly* by the highway commissioners, under How. Stat. §§ 1296, 1305, and such action by one commissioner is void. 250.

HOMESTEAD.

1. The homestead exemption secured by How. Stat. § 7721, may be claimed in premises occupied by the owner *exclusively* for hotel purposes, if his family reside therein and have no other residence or home. 195 (1).
2. Where a land-owner constructs his house, which he occupies as a homestead, upon two lots, he is not thereby deprived of his statutory exemption. If the property comprising the homestead is worth more than $1,500, the statute provides a way by which he may receive the value of his exemption, and his creditors the remainder to apply on his debts. *Id.* (2).
3. A *verbal* promise to give a security cannot create a mortgage lien upon the homestead of the promisor. *Id.* (3).

HUSBAND AND WIFE.

1. A deed executed to a man and woman who are in *fact* husband and wife creates an estate in joint tenancy under How. Stat. §§ 5560, 5561. 131 (1).

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HUSBAND AND WIFE—Continued.

2. In such a case, if the *fact* of such relationship is not stated in the deed, it may be shown by parol testimony. *Id.* (2).

See EVIDENCE (12); FRAUDULENT CONVEYANCE; MARRIED WOMAN'S ACT.

INDUSTRIAL HOME FOR GIRLS—See INSANE PERSONS.

INFANT—See SPECIFIC PERFORMANCE (8).

INJUNCTION—See APPEAL (2); EQUITY; LANDLORD AND TENANT (3).

INJUNCTION TO STAY WASTE—See TAXES (1).

INNOCENT PURCHASER—See BONA FIDE PURCHASER.

INSANE ASYLUM—See HABEAS CORPUS (1-3); INSANE PERSONS.

INSANE PERSONS.

1. An order of commitment to the insane asylum which states that the female committed was a *resident* of the State Industrial Home for Girls, in Lenawee county, does not show upon its face that she was serving a term of imprisonment at that home. 528 (1).
2. The laws of this State make a distinction between insane criminals, and those insane persons who are not criminals; the former being governed by Act No. 190, Laws of 1883, as amended (3 How. Stat. chap. 47*a*), and the latter by Act No. 135, Laws of 1885 (3 How. Stat. chap. 46). *Id.* (2).
3. An order of commitment, made by the judge of probate of Lenawee county, of a female to the Michigan Asylum for the Insane at Kalamazoo, which recites that it is made upon a hearing on a petition on file which alleges that the female is a resident of the Industrial School for Girls, in said county, and is insane, and prays that she may be admitted to said asylum, there to be supported at the expense of said county, recites sufficient facts to give the probate court jurisdiction on the basis of her being such resident. *Id.* (3).
4. There *may* be some doubt whether Act No. 190, Laws of 1883, applies to insane criminals confined in the State Industrial Home for Girls; but as girls between 10 and 17 years of age may be sentenced to that institution when convicted of being disorderly persons, or of any offense not punishable by imprisonment for life, there is no reason why the statute should not apply to this class of insane persons as well as to

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INSANE PERSONS—Continued.

those who are serving sentences in the other penal institutions of the State. 529 (6).

5. Where, during an investigation by a probate judge of an application for the admission of an indigent insane person to the insane asylum, it appears that such person has not acquired a legal settlement in his county, he is not ousted of jurisdiction, nor can he refuse for that reason to make the desired order of admission; and he should order the expense to be paid by his county in the first instance, leaving the question of residence and of the county finally liable for such support to be determined as provided by section 25 of Act No. 135, Laws of 1885. *Id.* (8).

INSOLVENCY—See EVIDENCE (16, 17).

INSURANCE—See BENEFIT ASSOCIATIONS; FIRE INSURANCE; PARTIES (1).

JOINT DEBTORS—See DISCONTINUANCE.

JOINT DEFENDANTS—See APPEAL (1).

JOINT TENANCY.

A deed executed to a man and woman who are in *fact* husband and wife creates an estate in joint tenancy under How. Stat. §§ 5560, 5561. 131 (1).

See MARRIED WOMAN'S ACT.

JUDGMENT CREDITOR'S BILL.

1. In order to warrant the filing of a judgment creditor's bill under How. Stat. § 6614, an execution must have been *delivered* to the proper officer at least 20 days *before*, and have remained in his hands *until*, the return-day, and have been returned by him unsatisfied. 189 (1).

2. The following general propositions are summarized from the opinion of Mr. Justice GRANT:

a—By How. Stat. § 7664*a*, executions may be made returnable in not less than 20 nor more than 90 days from their issuance.

b—A judgment creditor's bill will not be retained if filed before the return-day of the execution, nor if the execution is returned before the return-day.

c—Under the decisions of this Court, the debtor is entitled to have the execution remain in the hands of the sheriff from the time of its delivery to him until the return-day.

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JUDGMENT CREDITOR'S BILL—Continued.

d—An execution cannot be considered as being issued until it is placed where it might have been executed, and some efficient act done under it. *Id.* (2).

See PARTIES (4).

JURISDICTION.

All objections to the process by which a defendant is brought into court are waived by him by pleading to the merits. 40.

See AFFIDAVIT; REPLEVIN.

JURY.

Whether a judgment was secured by fraud and collusion is a question to be submitted to the jury under proper instructions. 200 (4).

See ARGUMENT TO JURY; LIBEL AND SLANDER (3); PRACTICE IN CIRCUIT COURT (5); QUESTIONS TO JURY.

JUSTICE'S RETURN—See EVIDENCE (2).

LABOR DEBTS.

1. Services rendered by a practical miller at a monthly salary and expenses, for a corporation engaged in the manufacture and sale of flouring-mills and milling machinery, in going from place to place after sales were made, and putting the machinery in running order, and giving it a trial to see if it performed the contract of sale satisfactorily, are held to be *labor* performed for the corporation, within the letter and spirit of Act No. 94, Laws of 1887, which prefers *labor* debts due from insolvent debtors. 513 (1).
2. Act No. 94, Laws of 1887, which prefers debts due for labor performed for insolvent debtors, creates no new liabilities, but merely regulates the distribution of insolvent estates. *Id.* (2).
3. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—In cases which have come before this Court wherein a liability was sought to be enforced against stockholders for labor performed for the corporation, a restricted construction of the meaning of the word "labor" has been adopted, under the well-known rule that a surety is only liable according to the strict terms of his undertakings.

b—In *Brockway v. Innes*, 39 Mich. 47, it was held that the

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LABOR DEBTS—Continued.

services of an assistant chief engineer of a railroad company in constructing its road were not labor performed for the corporation, within the meaning of section 7 of article 15 of the Constitution, which makes stockholders individually liable for all such labor.

c—In *Peck v. Miller*, 39 Mich. 594, it was held that stockholders occupied the position of sureties to the corporation with respect to liability for labor debts, and that courts cannot enlarge a surety's liability beyond the plain terms of his suretyship, and that railroad contractors were not within Comp. Laws of 1871, § 2412, making stockholders individually liable to an amount equal to their stock for all labor performed for the company.

d—In *Railroad Co. v. Sturgis*, 44 Mich. 538, it was held that under Comp. Laws of 1871, §§ 2393-2395, providing for the protection of laborers and persons furnishing material for the construction and repairing of railroads in this State, a distinction is clearly marked between those who contract *for* labor and materials and the persons who actually perform the labor and actually furnish materials. The law limits its protection to the one who labors, and does not lend it to the one who merely hires out the labor of others.

e—In *Jones v. Avery*, 50 Mich. 326, it was held that a claim for services performed by a traveling salesman hired at an annual salary of $1,000 was not a labor debt, within the meaning of the Constitution, and hence a stockholder was not liable for it. *Id.* (3).

LAND CONTRACT—See CONTRACT (1, 2); SPECIFIC PERFORMANCE.

LANDLORD AND TENANT.

1. A farm lease provided for the working of the farm in a good and workman-like manner, and, in case of a failure so to do, reserved to the lessor the right to perform the work, and deduct the cost from the lessee's share of the crops, who was given full possession of the house on the farm during *his* tenancy, without compensation therefor. The forfeiture and re-entry clauses were stricken from the printed blank used in preparing the lease. And it is held that the right of the tenant to remain in possession of the farm during the term of the lease did not depend upon the manner of his performance of the agreement as to working the same, and that non-per-

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LANDLORD AND TENANT—Continued.
formance of this agreement would not forfeit the lease. 25 (4).
2. A consent by a lessor that a third party may occupy the leased premises for a specified business under the lessee, who is to be responsible for the rent, is a restrictive waiver of conditions not to sublet or carry on any other than the kind of business to which the lessee is restricted by the lease, and applies only to such third person and to his specified business. 56 (1).
3. Covenants affecting the mode of occupation and enjoyment of leased premises run with the land, and the assignee, though not named, may be restrained by injunction from violating the same. *Id.* (2).
See DAMAGES (1); ESTATES OF DECEASED PERSONS; FORCIBLE ENTRY AND DETAINER (1).

LEASE—See LANDLORD AND TENANT.

LIBEL AND SLANDER.
1. The declaration in a libel case averred in the first count that the defendant falsely and maliciously published in a public newspaper, in a coarse and blotted imitation of the handwriting of the plaintiff, who was a candidate for Congress, over an imitation of his genuine signature, the following libelous words: "I don't propose to go into debate on the tarriff differrences on wool, quinine, and all the things, because I ain't built that way;" that some of the words were misspelled, as above shown, and all of them were so printed and published as naturally to induce the belief on the part of the reader that the plaintiff actually wrote and subscribed the letter of which said words purported to be a *fac-simile*. In the second count plaintiff averred that at a public meeting in his district he made a speech, and that the defendant published a report of the same, in which report it was falsely and maliciously stated that plaintiff said that he was not there as a candidate begging for votes, and that he would refrain from discussing the tariffs on wool, quinine, etc., because "he wasn't built that way;" the meaning of which latter words was averred to be that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it. And it is held that the declaration made out a case proper to be submitted

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LIBEL AND SLANDER—Continued.
upon the facts which may be shown by the evidence. 583 (1).
2. The following general propositions are summarized from the opinion of Mr. Justice GRANT:
a—Criticism is a discussion, or, as applicable in libel cases, a censure, of the conduct, character, or utterances of the person criticised.
b—When one becomes a candidate for public office he thereby deliberately places his conduct, character, and utterances before the public for their discussion and consideration, and they may be criticised according to the taste of the writer or speaker, who will be protected in so doing, if in their statements of or reference to the facts upon which their criticisms are based they observe an honest regard for the truth.
c—Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. *Id.* (2).
3. To charge that a jury have perjured themselves in rendering a certain verdict is libelous. 661 (1).
See EVIDENCE (21-25).

LIEN—See EVIDENCE (18); VENDORS' LIEN; MECHANICS' LIEN.

LIFE INSURANCE—See BENEFIT ASSOCIATIONS; PARTIES (1).

LIQUOR TRAFFIC.

1. The sureties upon a liquor bond which has been approved and filed by the county treasurer remain liable for any breach committed by the principal within the year for which the bond was so filed, and cannot discharge themselves from liability by removing from the limits of the corporation within which the business is carried on, nor will they be so relieved by notice from the county treasurer to the principal to file a new bond, and in the meantime to desist from the prosecution of his business. 111 (2).
2. It is not necessary, in an information for keeping a saloon open contrary to the statute, to state that the respondent is not a druggist, the *name* in such a case distinguishing the *place*. 355 (1).
3. A complaint and warrant properly charged the respondent with the offense of keeping his saloon open contrary to the

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LIQUOR TRAFFIC—Continued.

provisions of section 17 of Act No. 313, Laws of 1887. He waived an examination, and on the trial at the circuit the information was objected to for failing to allege that the respondent was not a druggist, or that the place kept open was not a drug-store, which negative averments were in the complaint and warrant, and the court allowed the information to be amended by inserting them therein. And it is held that the amendment was properly allowed, if one was at all necessary. *Id.* (2).

See NEGLIGENCE (2); PLEADING (2–4).

MALPRACTICE—See CHARGE TO JURY (2); EVIDENCE (13, 14).

MARRIED WOMAN.

A married woman is liable for the price of clothing purchased by her for a minor son, and charged to her by her direction, she agreeing to pay for the same. 116 (5).

See DISCONTINUANCE; EVIDENCE (1, 12).

MARRIED WOMAN'S ACT.

The "married woman's act," so called (How. Stat. § 6295), did not repeal by implication How. Stat. §§ 5560, 5561, in so far as they provide for the creation of an estate in joint tenancy by the execution of a deed to husband and wife. 131 (3).

MECHANICS' LIEN.

An assignment by a contractor, to a third person, of the moneys to become due upon the contract, with notice to the land-owner of such assignment, will not deprive a subcontractor of his lien upon the premises under the mechanics' lien law, but such lien will be limited in amount to the sum actually due and owing to the contractor from such owner at the time of filing and serving the notice of lien. 478 (2).

MEMORANDA—See EVIDENCE (15).

MERCANTILE AGENCY—See FRAUDULENT PURCHASE.

MORTGAGE.

1. Where there are several notes secured by a mortgage, neither has priority over the others by reason of maturing at an earlier date, but all have an equal claim to be paid ratably out of the land. 231 (1).
2. A mortgagee sold two of three mortgage notes, and assigned

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MORTGAGE—Continued.

a corresponding interest in the mortgage, which fact was stated in the assignment. And it is held that parol testimony is inadmissible to show an alleged agreement that the assignee was to have a priority of lien under the mortgage as security for the payment of his notes. *Id.* (2).

3. The assignee of an interest in a mortgage corresponding to two of the three notes, which he had purchased, foreclosed the mortgage by advertisement, and on the expiration of the redemption year took possession of the mortgaged premises under his sheriff's deed. The assignor commenced a suit to foreclose his interest in the mortgage, and secured a decree setting aside the statutory foreclosure, and directing a sale of the land, and a division of the proceeds realized thereon between the assignor and assignee according to their respective interests. And it is held that the statutory foreclosure did not affect the relative rights of the assignor and assignee, but that, as the assignee had purchased the equity of redemption, he had the right to redeem from the lien of the assignor under the mortgage, and that, failing to do this within six months, the premises be sold as in ordinary foreclosure cases, and the moneys realized divided according to the respective interests of the parties. *Id.* (3).

4. A foreclosure bill was amended by adding new parties, and was again amended by correcting the name of one of the added parties by changing his sirname from Hamlin to Hammond, his real name. And it is held that a sale could not be decreed until one year after the filing of the last amendment, by which Hammond was made a party defendant. 365.

5. Complainant filed a bill for the reformation of a chattel mortgage upon a building by inserting therein the description of the land on which the building stood, and which at the time of the execution of the mortgage was held by the mortgagor under a land contract, and to declare it a real-estate mortgage, and to foreclose it as such; and in affirming a decree dismissing the bill it is held that the instrument was only intended by the parties as security on the building. 407.

6. A mortgage given to secure an antecedent debt will not operate as a purchase for value to defeat existing equities. 450 (3).

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MORTGAGE—Continued.

7. The excess paid by a purchaser at a statutory foreclosure sale above the amount due, by reason of the addition of attorney's fees, belongs to whoever is entitled to the surplus arising on such sale, and cannot be claimed by the purchaser. 487 (3).

See CHATTEL MORTGAGE; HOMESTEAD; PARTNERSHIP (1); STATUTE OF LIMITATIONS.

MUNICIPAL CORPORATIONS.

1. Where a city ordinance prohibits the depositing of refuse matter in alleys, and also provides for its removal by the owner of the lot adjoining such alley within twenty-four hours after being notified so to do by the proper officer, a violation of the ordinance exists when the act prohibited is committed, which is not cured by a compliance with the order of removal, which is designed to secure the abatement of the nuisance created by such unlawful act. 457 (1).
2. A city ordinance prohibiting the accumulation by livery-stable keepers of more than two cart-loads of manure in or near their stables and stable-yards, during certain months, is held not to recognize their right to deposit manure in the adjacent alleys. *Id.* (2).

NEGLIGENCE.

1. This case is ruled by *Boick v. Bissell*, 80 Mich. 260, and the question of the negligence of plaintiff and of defendant was properly submitted to the jury. 36.
2. In a suit by a wife to recover from a liquor dealer and his sureties damages for injuries sustained by her by being thrown from a carriage, in which she was riding with her husband, by reason of its being overturned through the negligence of intoxicated persons, the contributory negligence of the husband, if any, does not enter into the issue, the cause of action being statutory, and not in any manner based upon the negligence of the injured party. 111 (3).
3. A request for an instruction in a negligence case that if the defendant knew that the plaintiff was about to oil a saw, and assented to it, and while plaintiff was oiling it negligently pushed plaintiff onto the saw, he may recover damages for the injuries thereby occasioned, is defective in omitting the important element of plaintiff's non-negligence. 140.

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NEGLIGENCE—Continued.

4. Without deciding whether, under all circumstances, a section foreman must be considered as a fellow-servant of the men working under him, so as to relieve the common employer from liability for his negligence, it is very clear that where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to, by the injured workman, with full knowledge of the peril, the question of the master's liability does not arise. 334.

5. In such a case evidence that the foreman was intemperate to an extent which made him an unsafe and unfit man for his position is irrelevant, it not being claimed that he had been drinking, or was under the influence of liquor, on the day of the accident. 335.

6. In this case it is held that in any view which can be taken of the testimony of the witnesses who saw the conduct of plaintiff's decedent, the substance of which is given in the opinion, it appears that he was not in the exercise of that care and caution which under the repeated decisions of this Court it was his duty to observe in approaching and crossing a railroad track. 432.

7. When the testimony shows affirmatively that the party who is injured through the negligence of another was himself negligent, and that such negligence contributed to bring about the result complained of, and such testimony is neither conflicting nor contradictory, it becomes a question of law for the court to decide whether there is any fact disclosed by the testimony to go to the jury upon the question of contributory negligence. 440.

8. In this case it is held that plaintiff's intestate was guilty of contributory negligence in undertaking to uncouple defendant's cars while in motion, and while passing over a "split switch" in use on its road, and which, as he must have known, could not be blocked at the place where his foot was caught. 564 (1).

See CHARGE TO JURY (2); EVIDENCE (5, 6); PLEADING (5); RAILROAD COMPANIES.

NEGOTIATIONS—See CONDEMNATION PROCEEDINGS (3, 4).

NEW PROMISE—See CONSIDERATION (1).

NON-PREJUDICIAL ERROR—See EVIDENCE (9).

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NOTICE.

In this case a statute providing that the first publication of a notice of an application for the impaneling of a jury in condemnation proceedings should be made *at least* thirty days *before* the day of hearing is construed to require that thirty *full* days shall intervene between such publication and the day of hearing. 279.

See BENEFIT ASSOCIATIONS; BONA FIDE PURCHASER (1, 2); CHATTEL MORTGAGE (4*b*); HIGHWAYS (2).

NUISANCE—See MUNICIPAL CORPORATIONS.

OATH TO JURY—See CONDEMNATION PROCEEDINGS (2).

OBJECTION—See PRACTICE IN CIRCUIT COURT (1).

ORDINANCE—See MUNICIPAL CORPORATIONS.

PAROL TESTIMONY—See HUSBAND AND WIFE (2).

PARTIES.

1. An objection that an administrator is not the proper person to bring suit upon a certificate of insurance in which the member to whom it is issued is the beneficiary should have no weight where the administrator is also the sole heir at law of the deceased, and entitled to the money due on the certificate. 92 (1).
2. An attachment or execution creditor is a proper party to a bill to enforce the specific performance of a land contract. 123 (3).
3. A plaintiff who is the *sole* proprietor of a business which he carries on under a *firm* name has the right to sue a debtor in his *individual* name, and in fact can sue in no other way. 226 (1).
4. A judgment creditors' bill was filed against a corporation and five of thirty-four stockholders, one of whom was not brought in by the service of subpœna or otherwise. The remaining stockholders were alleged to own 1,020 of the 12,000 shares of stock issued by the corporation, and were sought to be charged with all of the corporate debts that the corporate assets would not meet, on the ground that they purchased their stock at 25 cents on the dollar. The bill alleged on information and belief that many of the stockholders were

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PARTIES—Continued.

minors, insolvent, or non-residents of the State, but no claim was made that *all* of those not joined as defendants fell within these classes. And it is held that such general allegation fails to show that all of the stockholders were made parties who should contribute to the payment of the corporate debts, and that the bill was properly dismissed as to the stockholder defendants for want of necessary parties, they having interposed such defense by way of demurrer. 372.

See BILLS AND NOTES (2, 3); EJECTMENT (1); EQUITY PRACTICE; SPECIFIC PERFORMANCE (3).

PARTITION—See TENANTS IN COMMON (2, 3).

PARTNERSHIP.

1. One partner has the authority to execute a mortgage to secure partnership debts, and in so doing he binds all of his copartners. 506 (1).
2. A bill of sale by one partner to a third person of all of his right, title, and interest in the partnership property, the vendee assuming the undivided firm debts, constitutes the vendee a partner with the other partner, who consents to such sale, and to the vendee's standing in the place of the vendor in the firm; and the fact that the parties did not then execute articles of copartnership, but agreed to do so thereafter, is not evidence of the non-existence of such partnership. 507 (3).
3. Articles of partnership provided that the managing partner should not run the firm in debt without the consent of his copartner, who agreed to loan the firm what money was needed from time to time to keep up the stock, and who was to be its only creditor. The managing partner gave the firm note to himself, as guardian, for money belonging to his wards, which was used in the partnership business, and after the note was past due he indorsed it to a third party for the *sole* purpose of having it sued in the indorsee's name who brought suit accordingly. And it is held that the managing partner had no power to make the note and bind the firm in the face of the partnership articles. 555 (2).

See EXEMPTIONS; PARTIES (3).

PAYMENT.

Plaintiff loaned defendants $56, taking as security a chattel mortgage on a piano and certain household goods payable in

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PAYMENT—Continued.

30 days, without interest, and calling for $60. He retained $1 for drawing the mortgage, and $3 for advance interest for one month. After the defendants had paid $33 in equal monthly payments, which were receipted for as interest in full up to the end of the succeeding month, they made a further loan of $20, and gave a new mortgage in the name of a clerk in plaintiff's office, for $84, payable in 30 days, and the first mortgage was discharged. This was done without any settlement being had between the parties. The second mortgage was subsequently assigned to plaintiff. After defendants had paid $40 on the second mortgage in monthly payments, which were receipted for as interest, and which receipts provided for monthly extensions, the defendants refused to make any further payments, and tendered the balance they claimed to be due on the mortgage, which tender was refused, and plaintiff replevied the property. The case was tried before the circuit judge without a jury, who found the foregoing facts, and that the giving of the mortgages was virtually one transaction, there being no settlement, and that the payments made, with the sum tendered, were sufficient to discharge the mortgage lien, and rendered judgment for the defendants, which is affirmed. 358 (3).

See FRAUDULENT PURCHASE (1).

PAYMENT ON DELIVERY—See CONTRACT (4).

PER CURIAM OPINION.

The fact of the filing of a *per curiam* opinion does not detract from the *force* of the decision, nor indicate that the question was lightly treated, but rather that the Court were united in regarding the point as without force, and as not requiring elaboration. 131 (4).

PLEADING.

1. All objections to the process or proceedings by which a defendant is brought into court are waived by him by pleading to the merits. 40
2. In a suit by a wife to recover damages alleged to have been sustained by reason of the sale of liquor to her husband when intoxicated, it is not necessary to allege that the saloonkeeper *knew* that he was intoxicated, that fact being presumed from the very nature of the case. 52 (1).
3. A declaration alleged the delivery and furnishing of intoxi-

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cating liquors to plaintiff's husband between certain dates, he being a person in the habit of getting intoxicated, so that he became wasteful and careless of his means, and deprived plaintiff of her proper support, and finally, on a specified day, by reason of such liquors furnished, in whole or in part, by the defendant, was fatally wounded, whereof he died; and that plaintiff, by means of such furnishing of liquors to her said husband, became greatly injured in her person, and also in her means of support. On the trial an objection was made to the admission of any testimony, on the ground that the declaration did not set forth a cause of action, which was sustained, and a verdict directed for the defendants, before the rendition of which the court refused an application by the plaintiff to amend. And it is held that the declaration contained all of the elements of statutory liability, and that the only objection, in substance, that could be raised to it is the failure to allege the defendant's knowledge that the husband was in the habit of getting intoxicated, so as to make the sale clearly unlawful; and that, when *such* a question is raised for the *first* time on the trial, an amendment should be allowed; citing *Ryan v. Fralick*, 50 Mich. 483, as laying down the correct practice. *Id.* (2).

4. A declaration in a civil damage case contained no *direct* allegation that the sale of liquor complained of was made to *intoxicated persons* or to those in the *habit of becoming intoxicated*, but did charge that the defendant sold certain persons liquor, and that, by reason thereof, he, in an *unlawful* manner, caused them to become greatly intoxicated. And it is held that, if the declaration was defective for want of such allegation, the defendants should have raised the objection by demurrer, and that, as the proofs tended to show the sale of liquor to the persons named *when intoxicated*, the declaration should have been amended to correspond with the proofs, which amendment will be considered as so made in furtherance of justice, and in support of the verdict and judgment. 110 (1).

5. Plaintiffs sought to recover on the common counts in *assumpsit* for an extra fly-wheel furnished by their testator under a contract made by him with the defendants for the sale to them at a specified price of a power outfit, to be by him set up in their flouring-mill in the city of Grand Rapids,

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PLEADING—Continued.

without expense to them, except that they were to do all *teaming* required in said city. The original fly-wheel was broken by defendants' employés while hauling it to the mill, and plaintiffs' testator furnished another one in its place, and on the completion of the contract the contract price was paid by the defendants. The bill of particulars contained charges for all of the items of machinery covered by the contract, including the original fly-wheel, and also a charge for the fly-wheel furnished in its place. On the trial plaintiffs' counsel offered to show the foregoing facts, and that the breakage occurred through the negligence of defendants' employés, and that the new wheel was furnished upon the express understanding that the question of who was liable for it should be settled thereafter, and plaintiffs sought to recover for the value of the new wheel, which recovery, it is held, cannot be had under the common counts in *assumpsit*. 537.

See CHARGE TO JURY (2); LIBEL AND SLANDER (1); LIQUOR TRAFFIC (2, 3).

PLEDGEE IN POSSESSION—See CHATTEL MORTGAGE (3).

POSSESSION—See ESTATES OF DECEASED PERSONS.

POSSESSION OF PLEDGEE—See CHATTEL MORTGAGE (3).

PRACTICE IN CIRCUIT COURT.

1. It is the duty of an attorney who objects to the admission of testimony to state the grounds of his objection, and unless this is done the objection will not be considered in the Supreme Court. 256 (1).
2. Only the trial judge to whom a case has been submitted for decision can properly hear and pass upon a motion to amend the plea by adding an affidavit denying the execution of written instruments sued upon, upon the ground that the question of such execution was fairly raised by the evidence, making the proposed amendment in the nature of one to cover proofs. 646 (1).
3. A motion to amend a plea by filing an affidavit denying the execution of written instruments described in the declaration is properly heard by the circuit judge before whom the case has been tried, and who has reserved his decision, though at the time of the entry of the motion the county in which the

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PRACTICE IN CIRCUIT COURT—Continued.
suit was tried has been made a part of another judicial circuit. *Id.* (2).

4. On the trial of a suit brought on village bonds the testimony tended to show that the bonds sued upon were not the ones authorized to be issued, but another set of the same amount, and contained recitals upon their face which the plaintiff claimed induced it to purchase in the belief that the bonds were such as the village had power to issue. The village had not denied the execution of the bonds under the rule, and, after the case was submitted to the court for decision, entered a motion for leave to amend its plea by adding an affidavit denying such execution, claiming that the latter bonds were never issued by authority of the village. And it is held that the allowance of the amendment, as in the nature of one to cover proofs, was within the discretion of the trial judge. 647 (3).
5. The trial judge cannot upon his own motion reject a qualified juror with whom the parties are satisfied, unless for sufficient cause, which should appear upon the record. 661 (3).

See ARGUMENT TO JURY; CHARGE TO JURY (1); FINDINGS OF FACT.

PRACTICE IN SUPREME COURT.

1. Where the record, and the brief of the appellant, are printed and served at the same time, inclosing the clauses of the charge which are objected to in brackets in the record is a convenient method of calling attention to them, and is permissible. 218 (3).
2. An exception to a conclusion of law is indispensable to its review in the Supreme Court. 251 (1).
3. A finding of fact, if supported by *any* evidence, is conclusive, and a party failing to except to a finding of law is regarded as acquiescing therein. *Id.* (2).
4. The judgment in this case is affirmed, it not being assigned as error that the facts found do not support the judgment. *Id.* (3).
5. In this case Supreme Court Rule No. 61, as amended July 2, 1890, is not complied with, in that no index to the record, or to the parts of the record to which the assignments of error apply, is furnished the Court; and the case having been twice tried, with a result adverse to the appellant on each trial, the judgment is affirmed. 475.

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PREFERENCE—See LABOR DEBTS.

PRELIMINARY SUBSCRIPTION PAPER—See CORPORATIONS (3).

PRINCIPAL AND AGENT.

1. The cashier of a *national* bank wrote a letter to the cashier of a bank in a neighboring state stating, in effect, that, if he would sign a bond for customers of the writer's bank to enable them to commence a replevin suit, "we will stand between you and all harm," which letter he signed officially. And it is held that the agreement was one which the national bank had no power to enter into, and that it cannot be said that the letter, upon its face, appears so clearly to have been intended as the undertaking of the bank, executed through the writer as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties. 200 (1).
2. Plaintiff, a resident of the state of Ohio, as one of the heirs of her mother, of whose estate defendant was administrator, was the owner of an undivided one-fifth interest in 80 acres of land, which she agreed to sell for $450 to another heir upon the advice of defendant, who negotiated the sale, and to whom plaintiff forwarded a deed in which the consideration was fixed at $450 and the name of the grantee left in blank. The proposed purchaser failing to complete the purchase at once, the defendant, without the knowledge of his wife, inserted her name in the deed as grantee, and forwarded to the plaintiff the $450. A few days afterwards the defendant sold the interest conveyed by said deed to the same proposed purchaser for $600, and the plaintiff brought this suit to recover the $150 received in excess of the $450 remitted to her, claiming that defendant was acting as her agent in the entire transaction, and that the money received on the sale belonged to her; in which contention she is sustained by the Court. 328.
3. A principal is chargeable with such facts as are known to his agent.

   So *held*, where an attorney at law, having funds to invest for a client, purchased for him a note with knowledge that a portion of the consideration for which it was given consisted of attorney's fees added to the amount claimed to be

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PRINCIPAL AND AGENT—Continued.

due on a statutory foreclosure, of which fact the client was ignorant, taking no part in the purchase of the note. 487 (4).

4. The president of a corporation engaged in the manufacture of salt and lumber purchased the interest of the vendee in a contract for the sale of timber, and gave him in payment his individual note for $7,000, and the note of the corporation for $8,000, and took an assignment of the contract in his own name. The papers nowhere mentioned the corporation as having any interest in the purchase. The president sold a half interest in the contract to a third party, which is held to indicate clearly that the purchase was his own; and the other facts stated are held insufficient to show that he represented the corporation in making the purchase. 496 (2).

PRINCIPAL AND SURETY.

1. The change in the terms of an agreement which will operate to discharge a surety must have been made by the *intentional* act of the original parties. 342 (1).

2. A land-owner agreed to advance a specified sum, to be used in erecting a hotel on the land, which the party to whom the advances were to be made was to lease for a term of years at a fixed rental, payable quarterly *in advance*, for the payment of which rent a third party became surety. After the completion of the buildings a lease was executed between the parties, by which the rent was made payable at the *end* of each quarter. Suit was brought against the lessee and the surety upon the original agreement to recover rent, after which the lessor filed a bill to reform the lease so as to conform to the agreement as to the time of payment of rent, he claiming that the change was made by mistake in drafting the lease. The surety was not made a party, and a *pro confesso* decree was secured reforming the lease, as prayed. On the trial of the suit at law the decree and anterior proceedings were received in evidence without objection. The surety introduced the testimony of two witnesses tending to show that the change as to time of payment of rent was intentional, which testimony was uncontradicted. The circuit judge held that the surety was discharged, and directed a verdict for the defendants, and in affirming the judgment it is held:

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PRINCIPAL AND SURETY—Continued.

a—As between the parties to the chancery suit, the decree is conclusive that the change as to time for payment of rent was made by mistake; but the same rule does not apply to the surety, who, if made a party, could have shown in the chancery suit, and may show in the suit at law, that the change was intentionally made, thereby discharging him from liability.

b—This defense is made out, *prima facie*, by the introduction of the lease, and is rebutted by the introduction of the enrolled decree, and the burden is cast upon the surety to negative the alleged mistake, which he is held to have done by the testimony of the witnesses before referred to. *Id.* (2).

PROCESS—See JURISDICTION.

PUBLICATIONS OF FALSEHOODS—See LIBEL AND SLANDER (*c*).

PURCHASE FOR VALUE.

The conveyance of chattels as security for an *antecedent* debt will not operate as a *purchase for value* to defeat existing equities. 450 (3).

See BONA FIDE PURCHASER (3, 4).

QUESTION FOR JURY—See JURY.

QUESTIONS TO JURY.

There is no provision in the statutes relative to condemnation proceedings authorizing the submission of special questions to the jury, or to commissioners. 81, 33 (1).

RAILROAD COMPANIES.

1. Whether Act No. 174, Laws of 1883, p. 191 (3 How. Stat. § 3397*a*), requiring railroad companies so to adjust, fill, or block the frogs, switches, and guard-rails on their roads as to prevent the feet of employés from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, *query*. 564 (2).
2. The failure of a railroad company to comply with the provisions of said act will render it liable to an employé who is thereby injured, in the case where the law applies, if he is not himself guilty of negligence. *Id.* (3).

See CONSTITUTIONAL LAW (8, 9).

"RED LYON WHEAT NOTE"—See BILLS AND NOTES (1).

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REGENTS OF THE UNIVERSITY—See TAXES (10).

RELEASE OF DOWER—See FRAUDULENT CONVEYANCE.

REMEDY AT LAW—See EQUITY JURISDICTION.

REPLEVIN.

Plaintiff replevied a flock of geese in the circuit court, appraised at $8.80, and shown on the trial to be worth $9.00. The value was alleged to be $200 in the declaration; and the judgment of the circuit court, dismissing the suit for want of jurisdiction, is affirmed. 561.

REQUEST TO CHARGE—See NEGLIGENCE (3).

RES JUDICATA.

The law of this case was settled by the opinions in 71 Mich. 656, and 78 Id. 455, and ought to, and must, under all of the authorities, remain the law so far as this case is concerned. 218 (1).

See PRINCIPAL AND SURETY (2).

RETROACTIVE STATUTES—See STATUTE OF LIMITATIONS (1).

RETURN OF JUSTICE ON APPEAL—See EVIDENCE (2).

SALE.

It is essential to the validity of every *executed* contract of sale that there should be a subject-matter to be contracted for; and if it appears that such subject-matter was not, and could not have been, in existence at the time of making the contract, it is of no effect, and may be disregarded by either party. 347 (1).

See FRAUDULENT PURCHASE; MORTGAGE (1).

SPECIAL QUESTIONS TO JURY—See QUESTIONS TO JURY.

SPECIFIC PERFORMANCE.

1. The right of a vendee to the specific performance of a land contract cannot be cut off by *fraudulent* attachment levies, nor by the levy of a *valid* attachment or execution against the vendor *after* the date of the contract. 123 (1).
2. Equity, having once taken jurisdiction to enforce the specific performance of a land contract, will retain it to adjust the conflicting claims to the purchase money, which the vendee will be decreed to bring into court for the party entitled to it. *Id.* (2).
3. An attachment or execution creditor is a *proper* party to a

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SPECIFIC PERFORMANCE—Continued.

bill to enforce the specific performance of a land contract, for at most he stands in the place of the vendor, and is bound by his duty, if he claims his interest in the land. *Id.* (3).

4. This case involves the question of the performance of an ante-nuptial agreement for the conveyance of an undivided interest in land by the man to the woman, and the execution by her to him of a life-lease, which contract has been performed on his part, and a decree is entered for a specific performance on her part. 259 (2).

5. A tender to the vendees in a land contract at their house in a distant part of a large city, late in the afternoon and after banking hours, of a deed of the land contracted for, coupled with a demand for the payment of the purchase price, amounting to a sum larger than the vendees could reasonably be supposed to have with them, and without giving them an opportunity to have the deed examined by their attorney, is not a proper tender of performance on the part of the vendors, and will count for nothing more than an express notice to the vendees that the vendors were insisting upon the acceptance of such a title as they had (there having been a delay in closing the sale on account of an alleged defect in the title), and that the vendees were required to act promptly if they desired to insist upon a specific performance of the contract. 395 (3).

6. Defendants Weber contracted to sell complainants certain land for $3,500, of which $25 was paid down, and $3,475 was to be paid on the delivery of a deed conveying a good and clear title, and of an abstract of title, with tax statements, of the land. Complainants went into possession, soon after which the abstract was furnished, and, on its being submitted to an attorney, the parties were advised that it was necessary to procure a deed from certain heirs in order to perfect the title, and to this end negotiations were had with said heirs, but by reason of the excessive price asked by them the deed was not procured. The defendants finally insisted upon the acceptance of the title as it then stood, claiming that it was good, and that the alleged defect was only an apparent one, they and their grantors having held adverse possession of the land for thirty years, and tendered a warranty deed of the land and an abstract of title, and demanded

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SPECIFIC PERFORMANCE—Continued.

payment, but not in such a manner as to forfeit complainants' right to a specific performance of the contract because of their refusal to comply with the demand. On the following day complainants offered to accept the title in its then condition, and make such payment, and specific performance is decreed in their favor. 396 (4).

7. The power of the equity court to compel the specific performance of a parol contract to convey land, which has been fully performed by the vendee, is undoubted. 628 (1).
8. The failure of an infant to file a bill to enforce the specific performance of a parol contract for the conveyance of land to her father, which he fully performed in his life-time, will not prevent her doing so after arriving at full age. *Id.* (2).

SPLIT SWITCHES—See RAILROAD COMPANIES.

STATE INDUSTRIAL HOME FOR GIRLS—See INSANE PERSONS.

STATEMENTS—See EQUIVALENT STATEMENTS.

STATUTE OF LIMITATIONS.

1. Act No. 204, Laws of 1879 (How. Stat. § 8709), in so far as it bars mortgage foreclosures, at law or in equity, unless commenced within fifteen years from and after the maturity of the mortgage debt, or within a like period after the last payment was made thereon, is not *retroactive*. 211 (1).
2. The proviso to Act No. 204, Laws of 1879 (How. Stat. § 8709), which excepts from its operation mortgages which have been due, or the last payment upon which was made, fifteen years or more prior to the passage of the act, and bars suits or proceedings for their foreclosure unless commenced within five years after the act took effect, provides for a reasonable time within which to commence such suits or proceedings. *Id.* (2).

STATUTES CONSTRUED.

1. Act No. 187, Laws of 1887, imposing certain duties upon prosecuting attorneys in divorce cases where there are children under fourteen years of age, is construed as follows:

a—The statute is *mandatory* that the prosecuting attorney enter his appearance, and thus secure a copy of the bill and notice of all further proceedings in the case.

b—After receiving such copy, he is to exercise his judgment

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STATUTES CONSTRUED—Continued.
whether the interest of such child or children, or the public good, requires further action on his part, and to that end the duty of making a proper investigation to obtain facts upon which his judgment can act is laid upon him as a *salaried* officer.

c—The act does not presuppose that he will find it necessary in *all* cases to enter a contest, and oppose the granting of a decree; but this is only required when he is satisfied from *such* investigation that the statutory reasons exist for such action on his part.

d—The care and custody of the children, and the allowances to be made in their behalf, in case a divorce is granted, are matters *exclusively* for the court, and do not come within either the letter or spirit of the statute.

e—The statute does not contemplate a mere *pro forma* appearance at the taking of testimony *by the parties*, and an examination of *their* witnesses, in order to decide if the prosecuting attorney will oppose a decree, but requires a real and *bona fide* contest upon evidence introduced for the purpose of showing that the interests of the children require that a divorce shall not be granted. He is not precluded from examining the parties' witnesses with a view to establishing *that* fact; and in many cases, and perhaps in nearly all, such examination may be the only means of obtaining the necessary information.

f—The statute permits the court to order an examination of the parties, and the prosecuting attorney may find it necessary to apply to the court for such order.

g—While the act implies a previous investigation to enable the prosecuting attorney to form his judgment, it fails to provide him with any compulsory means of obtaining information. He cannot send for persons or papers, nor compel the attendance of witnesses before himself, but is left to such means as a private person has of obtaining information respecting the affairs of others; and hence it may be that the only reliable information he can obtain is to be secured when witnesses are examined in the cause, and he must *then* determine whether the interests of the children or the public good requires him to oppose the granting of a decree.

h—It is for services in introducing evidence, appearing at

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the hearing, and opposing the granting of a decree of divorce that the statute allows the pittance of five dollars, to be paid from the county treasury,—a sum so greatly inadequate to compensate the officer for the honest discharge of his duty as to lead to the inference that the Legislature intended that the larger part of the duty should be performed under his *salary* as prosecuting attorney.

i—The public good requires that there shall be no collusive divorces where bills are filed or not defended by some understanding or agreement between the parties. *Here* the statute also requires the prosecuting attorney to investigate, and, if he is satisfied that the proceedings are collusive, he should contest the granting of a divorce.

j—The statute seems to require, by implication, that the prosecuting attorney should acquaint the court of his determination to contest the granting of a divorce, and obtain its consent, by an order duly entered, to such contest; and in such a case, when he has introduced evidence, appeared at the hearing, and opposed the granting of a decree, he is entitled to have his services certified by the circuit judge, whether successful in his opposition or not. 1 (2).

2. Act No. 228, Laws of 1889, authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—The purpose of the statute is to prevent the removal of timber without the payment of the taxes assessed on the lands, and thus to secure to the State the revenue which is justly due from the owners if the tax is legal.

b—The statute does not require that the bill shall allege and the complainant prove that the land would be *worthless* without the timber, or would not be worth the amount of the tax.

c—The statute applies only to *wild* lands, and makes the cutting of timber on lands *chiefly* valuable for their timber waste, and the clear intent of the Legislature was to force the payment of the taxes before the land is stripped of its *chief* value.

d—The township treasurer is made the agent of the State during his term of office to commence suit whenever the occasion arises, which cannot be done while the tax roll is

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STATUTES CONSTRUED—Continued.

in his hands, nor until the expiration of the time specified by law for payment of the taxes. 14 (2).

3. How. Stat. § 8307, providing for an appeal from judgments in summary proceedings to recover the possession of lands, does not, in express terms, provide that the commissioner shall indorse on the bond either that he has fixed the penalty or approved the bond; and when a bond is accepted in a certain penalty, and an appeal granted by making a return of the proceedings had before the commissioner, with the affidavit and bond on such appeal, it will be presumed in favor of the jurisdiction of the appellate court that the commissioner not only approved the bond, but fixed its penalty according to law. 24 (3).

4. A deed executed to a man and woman who are in *fact* husband and wife creates an estate in joint tenancy under How. Stat. §§ 5560, 5561. 131 (1).

5. The "married woman's act," so called (How. Stat. § 6295), did not repeal by implication How. Stat. §§ 5560, 5561, in so far as they provide for the creation of an estate in joint tenancy by the execution of a deed to husband and wife; citing *Fisher v. Provin*, 25 Mich. 347. *Id.* (3).

6. Act No. 244, Laws of 1889, amendatory of How. Stat. §§ 8059, 8091, which extends their operation so as to enable creditors to reach the *value* of property of the principal defendant received and held by the garnishee under a conveyance or title void as to creditors, and which he has disposed of, applies to garnishment proceedings instituted *after* the act took effect, although the goods were received and disposed of *prior* to that date. 153.

7. In order to warrant the filing of a judgment creditor's bill under How. Stat. § 6614, an execution must have been *delivered* to the proper officer at least 20 days *before*, and have remained in his hands *until*, the return-day, and have been returned by him unsatisfied. 189 (1).

8. The homestead exemption secured by How. Stat. § 7721, may be claimed in premises occupied by the owner *exclusively* for hotel purposes, if his family reside therein and have no other residence or home. 195 (1).

9. Act No. 204, Laws of 1879 (How. Stat. § 8709), in so far as it bars mortgage foreclosures, at law or in equity, unless commenced within fifteen years from and after the maturity

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STATUTES CONSTRUED—Continued.

of the mortgage debt, or within a like period after the last payment was made thereon, is not *retroactive*. 211 (1).

10. The proviso to Act No. 204, Laws of 1879 (How. Stat. § 8709), which excepts from its operation mortgages which have been due, or the last payment upon which was made, fifteen years or more prior to the passage of the act, and bars suits or proceedings for their foreclosure unless commenced within five years after the act took effect, provides for a reasonable time within which to commence such suits or proceedings. *Id.* (2).

11. Certain provisions of the tax law of 1889, for the sale of delinquent lands, are construed as follows:

a—The petition is filed against the land, and must pray a decree in favor of the State against the land.

b—No personal decree can be entered against the delinquent tax-payer, whether that term applies to the owner of the land when assessed or to the owner at time of filing the petition; and it is apparent that no purpose can be subserved by serving a subpœna upon the former.

c—The owner of the land at the time the petition is filed is a *proper* party, and it can be of no possible benefit or interest to him that his immediate or remote grantor be made a party. If he has a warranty deed, he may notify the grantor therein to come in and defend the action; but the State is only interested in the proceedings against the land. 460 (2).

12. The proviso of section 95 of Act No. 195, Laws of 1889, authorizing the receipt of 50 per cent. of the taxes on lands returned delinquent for the taxes of 1885, and previous years, in full payment and discharge of such taxes, applies whether such taxes have been *reassessed* or not. 464.

13. Property held by the Regents of the University of Michigan in their corporate capacity is the public property of the State held by the corporation in trust for the purposes to which it was devoted, and is exempt from taxation under the first subdivision of section 8 of Act No. 153, Laws of 1885, which provides that all public property belonging to this State shall be exempt from taxation. 467.

14. How. Stat. § 7686, providing for exemptions, does not apply to chattel mortgages executed by one partner in the firm

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STATUTES CONSTRUED—Continued.
name, although his copartners may be ignorant of their execution. 506.
15. Services rendered by a practical miller at a monthly salary and expenses, for a corporation engaged in the manufacture and sale of flouring-mills and milling machinery, in going from place to place after sales were made, and putting the machinery in running order, and giving it a trial to see if it performed the contract of sale satisfactorily, are held to be *labor* performed for the corporation, within the letter and spirit of Act No. 94, Laws of 1887, which prefers *labor* debts due from insolvent debtors. 513 (1).
16. Act No. 94, Laws of 1887, which prefers debts due for labor performed for insolvent debtors, creates no new liabilities, but merely regulates the distribution of insolvent estates. *Id.* (2).
17. An order of commitment to the insane asylum which states that the female committed was a *resident* of the State Industrial Home for Girls, in Lenawee county, does not show upon its face that she was serving a term of imprisonment at that home. 528 (1).
18. There *may* be some doubt whether Act No. 190, Laws of 1883, applies to insane criminals confined in the State Industrial Home for Girls; but as girls between 10 and 17 years of age may be sentenced to that institution when convicted of being disorderly persons, or of any offense not punishable by imprisonment for life, there is no reason why the statute should not apply to this class of insane persons as well as to those who are serving sentences in the other penal institutions of the State. 529 (6).
19. The person upon whom a writ of *habeas corpus* is duly served is required by How. Stat. § 8565, to state in his return, plainly and unequivocally, the authority and true cause of the imprisonment or restraint complained of, setting forth the same at large, and, if by virtue of any writ, warrant, or other written authority, to annex a copy thereof to his return, and to produce the original to the court or officer before whom the writ is returnable. *Id.* (7).
20. Whether Act No. 174, Laws of 1883, p. 191 (3 How. Stat. § 3397*a*), requiring railroad companies so to adjust, fill, or block the frogs, switches, and guard-rails on their roads as

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STATUTES CONSTRUED—Continued.

to prevent the feet of employés from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, *query*. 564 (2).

21. In a libel suit brought by a juror against the proprietor of a newspaper for charging that the jury in a certain case, of which the plaintiff was a member, perjured themselves in rendering their verdict, the plaintiff cannot be questioned concerning the verdict, or his motives or reasons for finding the same; such mode of questioning falling within the prohibition of How. Stat. § 7608, abolishing the common-law remedy of attaint upon untrue verdicts. 661 (2).

See ESTATES OF DECEASED PERSONS.

STREET RAILWAYS—See EQUITY.

SUBCONTRACTOR—See MECHANIC'S LIEN.

SUBJECT-MATTER—See SALE.

SUBSCRIPTION TO CORPORATE STOCK—See CORPORATIONS (3).

SUMMARY PROCEEDINGS—See ESTATES OF DECEASED PERSONS; FORCIBLE ENTRY AND DETAINER.

SUPREME COURT RULE No. 61—See PRACTICE IN SUPREME COURT (5).

TAXES.

1. Act No. 223, Laws of 1889, authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—The purpose of the statute is to prevent the removal of timber without the payment of the taxes assessed on the lands, and thus to secure to the State the revenue which is justly due from the owners if the tax is legal.

b—The statute does not require that the bill shall allege and the complainant prove that the land would be *worthless* without the timber, or would not be worth the amount of the tax.

c—The statute applies only to *wild* lands, and makes the cutting of timber on lands *chiefly* valuable for their timber waste, and the clear intent of the Legislature was to force the payment of the taxes before the land is stripped of its *chief* value.

d—The township treasurer is made the agent of the State

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TAXES—Continued.

during his term of office to commence suit whenever the occasion arises, which cannot be done while the tax roll is in his hands, nor until the expiration of the time specified by law for payment of the taxes. 14 (2).

2. Where provision is made by law for a review of assessment proceedings, and a body is appointed with power to set the assessment aside or correct the error complained of, and an interested land-owner fails to appear before said body after due notice, or to take any steps to have such correction made, he is not in a condition to appeal to the courts for redress in the absence of fraud or bad faith. 101.

3. The one dollar which the Auditor General is authorized by section 52 of Act No. 195, Laws of 1889, to add to the amount of taxes due on a parcel of land, for advertising and other expenses of sale, cannot be demanded of the tax-payer until *after* the tax petition has been filed and published as provided by section 54 of said act. 852.

4. Certain provisions of the tax law of 1889, for the sale of delinquent lands, are construed as follows:

a—The petition is filed against the land, and must pray a decree in favor of the State against the land.

b—No personal decree can be entered against the delinquent tax-payer, whether that term applies to the owner of the land when assessed or to the owner at time of filing the petition; and it is apparent that no purpose can be subserved by serving a subpœna upon the former.

c—The owner of the land at the time the petition is filed is a *proper* party, and it can be of no possible benefit or interest to him that his immediate or remote grantor be made a party. If he has a warranty deed, he may notify the grantor therein to come in and defend the action; but the State is only interested in the proceedings against the land. 460 (2).

5. A warrant for the collection of taxes is not fatally defective because addressed "to the treasurer of the township of ———," if it is properly signed by a supervisor of a specified township, and is annexed to its tax roll. 461 (3).

6. Allegations in an answer to a petition filed under the tax law of 1889, that defendants' lands were assessed beyond their cash value, and that "said excessive assessment was fraudulent and void," is too general and insufficient to per-

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TAXES—Continued.

mit evidence of fraud. The specific acts which are claimed to constitute fraud must be set forth, and it should also be alleged whether the fraud was that of the supervisor or board of review. *Id.* (4).

7. An excessive assessment (valuation) of land is not sufficient evidence of corrupt and fraudulent conduct on the part of the assessor or board of review. *Id.* (5).

8. If the defendants, by their answer, had based a defense upon the fact that the board of review had increased their assessments over those fixed by the supervisor without notice to them, they might have brought themselves within the rule in *Avery v. East Saginaw*, 44 Mich. 587; but no such issue is made by the pleadings. *Id.* (6).

9. The proviso of section 95 of Act No. 195, Laws of 1889, authorizing the receipt of 50 per cent. of the taxes on lands returned delinquent for the taxes of 1885, and previous years, in full payment and discharge of such taxes, applies whether such taxes have been *reassessed or not.* 464.

10. Property held by the Regents of the University of Michigan in their corporate capacity is the public property of the State held by the corporation in trust for the purpose to which it was devoted, and is exempt from taxation under the first subdivision of section 8 of Act No. 153, Laws of 1885, which provides that all public property belonging to this State shall be exempt from taxation. 467.

11. A record of equalization which fails to show the *assessed* valuation of the several townships, and the amounts added to or deducted therefrom, if any, for the purposes of such equalization, is fatally defective, and *voids* the entire levy of taxes for the year in which it is made. 471 (2).

12. A township treasurer is not liable in trover for property seized under a tax roll and warrant fair upon their face. 576 (1).

13. The drain law of 1885 (Act No. 227), in so far as it provides that drain taxes levied under the drain law of 1881 (Act No. 269) shall be a personal claim against the land-owner until paid, is invalid. *Id.* (2).

14. A tax roll and warrant under which the treasurer is commanded to collect of a land-owner reassessed drain taxes originally levied under the drain law of 1881, which facts appear upon the roll and warrant, are not fair upon their

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TAXES—Continued.

face, the officer being charged with the invalidity of Act No. 227, Laws of 1885, under which he has seized property to satisfy said tax. *Id.* (8).

15. A provision in a city charter exempting from taxation for fire-department purposes all unplatted parcels of land containing ten or more acres, and used exclusively for farming purposes, is a reasonable and valid one, and cannot be disregarded by the city authorities without a breach of faith, which the courts will not permit. 639 (1).

16. A city charter exempted parcels of unplatted land of a specified acreage, and used exclusively for farming purposes, from taxation for fire-department purposes. The city constructed water-works under the general statute of the State for the purpose of supplying the city and its inhabitants with water, which were also used for fire purposes. Taxes were levied upon land falling within the charter exemption to pay interest on the water-works bonds, which the owner paid under protest, and then sued the city to recover back the money, upon the ground that the use of the water for fire purposes exempted plaintiff from paying any portion of the expense of the water supply. In affirming a judgment in favor of the city the Court say:

a—The plaintiff is as much bound to contribute towards the expense of a water supply for all except fire purposes as are other property-owners, and it is not necessary for his protection that he escape his share of this *legal* tax because the city chooses also to furnish water for fire purposes.

b—The city being authorized to raise a tax for fire purposes, and the treasurer being required to keep the several funds separate, and to pay every warrant out of the particular fund upon which it is drawn, and the fund raised for fire purposes being one to which the plaintiff has not contributed, the city, as the owner of the water-works, should treat the fire-department as a customer, and should require to be paid from the fire-department fund into the fund raised for water supply, and for paying the water-works bonds, a fair and reasonable sum for the use of water for fire purposes.

c—It does not follow because no agreement has been made for such payment, or for the free use of water for fire purposes, that a proper adjustment of the matter has not been contemplated by the city authorities in the end, and the

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TAXES - Continued.

Court will not assume that the city will act unjustly in the premises, as it certainly would if it continued unreasonably to supply water to the fire department without charge, in which event the plaintiff would not be without a remedy.

d—The rule that where a portion of a tax is illegal, and a tax-payer has no way of separating it from the legal portion, he is not bound to pay any of the tax, cannot be applied in this case. *Id.* (2).

See CONSTITUTIONAL LAW (1, 2, 5–7).

TENANTS IN COMMON.

1. One tenant in common of lands cannot, under the law of this State, convey his interest in the timber on said lands, and thereby make the other tenants in common co-tenants with his grantee in said timber. 181 (1).
2. The only interest which such a grantee takes is the interest in the timber upon such of the land as in partition proceedings shall be set off to his grantor, which partition must be made of the *entirety* of the estate according to the shares held by each tenant, after which the grantee will be entitled to all of the rights secured by his conveyance. *Id.* (2).
3. The following propositions are summarized from the opinion of Mr. Justice GRANT:

a—The law, common and statutory, has always most carefully protected the owners of land in the inherent right to preserve and enjoy it as they desire, of which right they can only be deprived on the ground of public necessity, by sale upon execution, and in certain cases of partition.

b—The partition statute (How. Stat. § 7882) provides that if the commissioners report that the land held in common cannot be divided without *great* prejudice to the owners, and if the court shall be satisfied that such report is just and correct, it may order a sale; but if any portion of the lands can be divided without *great* prejudice, it must be partitioned, and only the remainder sold.

c—A tenant in common cannot commit waste upon the common lands, and if he does he is subject to an action on the case, and must respond in damages; and to cut and remove timber from unoccupied lands is waste.

d—It is well settled that where one tenant in common conveys to a stranger any but an undivided interest in the

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TENANTS IN COMMON—Continued.

whole of the land, where such interest is prejudicial to the rights of his co-tenants, such conveyance is void as to them. When partition of the lands is had between the co-tenants, courts may properly consider such conveyance in partitioning the lands so as to secure the interest of such purchaser. 182 (3).

TENDER—See PAYMENT.

TENDER OF DEED—See SPECIFIC PERFORMANCE (5, 6).

TIME—See NOTICE.

TOWNSHIP-LINE ROAD—See HIGHWAYS (4).

TRIAL JUDGE—See PRACTICE IN CIRCUIT COURT (2, 3, 5).

TRUSTEE—See EQUITY PRACTICE.

UNION DEPOT ACT OF 1881.

There is no force in the contention that the Union Depot Act of 1881 does not contemplate more than one union depot in each city or village. 265 (4).

See CONDEMNATION PROCEEDINGS (2); CONSTITUTIONAL LAW (3, 4).

VACANCY—See FIRE INSURANCE.

VENDOR'S LIEN.

1. A vendor's lien is waived *pro tanto* where the note of a third person is taken of the vendee for a portion of the purchase money. 496 (1).
2. The facts involved in this case are stated in *Bank v. Filer*, 80 Mich. 67, where the facts and law relating to petitioner's claim of a vendor's lien are fully discussed and stated. *Id.* (3).

VERDICT—See DIRECTING VERDICT; LIBEL AND SLANDER (3).

WAIVER.

All objections to the process by which a defendant is brought into court are waived by him by pleading to the merits. 40.

See FIRE INSURANCE (2); FRAUDULENT PURCHASE (1); PLEADING (1).

WARRANT—See AFFIDAVIT.

WASTE—See TAXES (1); TENANTS IN COMMON (c).

WILL.

This case involves the construction of certain devises in a will, and the following rules of construction are held applicable:

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WILL—Continued.

a—The plain intent of the testator as evinced by the language of the will must prevail.

b—Such intent must be gathered from "the four corners of the instrument."

c—The construction is not to be varied by events subsequent to the execution of the will.

d—A gift by words of general description is not to be limited by a subsequent attempt at a particular description, unless such appears to have been the intention of the testator as gathered from the whole will. 177 (1).

See ESTATES OF DECEASED PERSONS.

LAWS REFERRED TO.[1]

Constitution of Michigan.[2]

	Page
Art. iv. §§ 15, 20	462, 600
Art. iv. § 18	563
Art. xiii. §§ 7, 8	468
Art. xiv. § 1	600
Art. xv. §§ 1, 7	518, 600, 622
Art. xix. § 7	600
Art. xix*a*. § 1	597, 601
Art. xix*a*.	622

Revised Statutes of 1838.

Pt. 3, tit. 1, c. 5, § 34	670

Compiled Laws of 1857.

Page 638	596

Compiled Laws of 1871.

Page 752	597
§ 6790	488

Howell's Statutes.

	Page		Page
Chap. 91, 92	267	§ 3463	269
303, § 1	545	3464, 3466	271, 272
Page 888	267	3485–3487	269
§ 673	563	5559–5562	10, 131–133, 135
1296	251	6022	638
1305	251	6183	633
2123	287	6295	133
2869	563	6614	190
3323, subd. 9, p. 841	596	6701	366
3395	597	7000	52

[1] See Statutes Construed.

[2] See Constitutional Law.

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Howell's Statutes—Continued.

	Page		Page
§ 7525	229	§ 7987	41
7608	670	8059, 8091	156
7631	651	8307	27
7664	191	8378, 8379	482, 485
7664*a*	190	8380	481
7686	508	8498, subd. 4	235
7790	328	8610	535
7882	186	8709	214
7942	186	8739	258

Three Howell's Statutes.

Chap. 120c	389	§ 1170*f*1	353
Page 2936	461, 465, 468	1621*a*–1621*d*	351
3753	156	1740*f*6	580
3757	156	1740*g*4	581
3789, 3790	515	2132*a*–2132*e*	237
§ 1169*l*2	469	2283*e*	356
1169*n*	474	8749*m*	518

Session Laws.

1846, Act 42, § 15	626	1885, Act 227, c. 6, § 6	580
1846, Act 113, § 15	626	1885, Act 227, c. 6, § 14	581
1855, Act 82	596, 626	1885, Page 326	582
1869, Act 109, p. 182	597	1887, Act 94	515, 518
1871, Act 195	626	1887, Act 137	4
1871, Page 299, Vol. 2	644	1887, Act 280	351
1873, Act 79	623	1887, Act 313	53, 356
1873, Act 198	597, 627	1889, Page 6	389
1873, Page 542	597	1889, Act 149	41
1877, Act 177	627	1889, Act 179, § 29	533
1877, Act 198	237, 238	1889, Act 195	461, 468
1881, Act 269, § 23	580	1889, Act 195, § 52	353
1881, Page 320	267	1889, Act 202	593
1883, Act 190	532	1889, Act 214	237
1883, Page 191	574	1889, Act 223	14
1885, Act 135, § 23	532–534	1889, Act 244	156
1885, Act 158, §§ 8, 21	469, 474		

Supreme Court Rule.

No. 61 477

Circuit Court Rule.

No. 99 234

E. S. a. a.

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